S. HRG. 99-522

INDIVIDUAL TREBLE DAMAGE LIABILITY

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

S. 1300

A BILL TO PROVIDE FOR ANTITRUST LAW VIOLATORS TO BE SUBJECT TO INDIVIDUAL RESPONSIBILITY FOR TREBLE THE AMOUNT OF DAMAGES ATTRIBUTABLE TO THEIR VIOLATIONS, AND TO ASSURE FAIRNESS IN THE ALLOCATION AND AWARD OF ANTITRUST DAMAGES

JULY 29, 1985

Serial No. J-99-44

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
58-293 O WASHINGTON : 1986

S521-46

SENATE COMMITTEE ON THE JUDICIARY

STROM THURMOND, South Carolina, *Chairman*

CHARLES McC. MATHIAS, JR., Maryland	JOSEPH R. BIDEN, JR., Delaware
PAUL LAXALT, Nevada	EDWARD M. KENNEDY, Massachusetts
ORRIN G. HATCH, Utah	ROBERT C. BYRD, West Virginia
ALAN K. SIMPSON, Wyoming	HOWARD M. METZENBAUM, Ohio
JOHN P. EAST, North Carolina	DENNIS DECONCINI, Arizona
CHARLES E. GRASSLEY, Iowa	PATRICK J. LEAHY, Vermont
JEREMIAH DENTON, Alabama	HOWELL HEFLIN, Alabama
ARLEN SPECTER, Pennsylvania	PAUL SIMON, Illinois
MITCH McCONNELL, Kentucky	

DENNIS W. SHEDD, *Chief Counsel and Staff Director*
DIANA L. WATERMAN, *General Counsel*
DEBORAH G. BERNSTEIN, *Chief Clerk*
MARK H. GITENSTEIN, *Minority Chief Counsel*

CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

	Page
Thurmond, Chairman Strom	1
DeConcini, Senator Dennis	2
McConnell, Senator Mitch	24
Metzenbaum, Senator Howard	133

PROPOSED LEGISLATION

S. 1300, a bill to provide for antitrust law violators to be subject to individual responsibility for treble the amount of damages attributable to their violations, and to assure fairness in the allocation and award of antitrust damages 3

CHRONOLOGICAL LIST OF WITNESSES

Rule, Charles F., Acting Assistant Attorney General, Antitrust Division, Department of Justice, Washington, DC 5

Bell, Judge Griffin B., King & Spalding, Atlanta, GA; Ira Millstein, Weil, Gotshal & Manges, New York, NY; and A. Mitchell Polinsky, Josephine Scott Crocker, professor of law and economics, Stanford University School of Law, Stanford, CA 24

Brockmeyer, Michael, chief, antitrust division, attorney general's office, State of Maryland; Harold E. Kohn, Kohn, Savett, Marion & Graf, Philadelphia, PA; and Priscilla Budeiri, Public Citizen's Congress Watch, Washington, DC 64

Crawford, William, general counsel, Dart & Kraft, Inc., Northbrook, IL, on behalf of the Business Roundtable; Joseph R. Creighton, vice president-general counsel, Harris Corp., Melbourne, FL, on behalf of the Chamber of Commerce of the United States of America; Thomas R. Long, vice president and general counsel, Westvaco, New York, NY, on behalf of the National Association of Manufacturers 118

ALPHABETICAL LIST AND MATERIAL SUBMITTED

Bell, Griffin B.:
- Testimony 38
- Prepared statement 40
- Response to questions of Senator Metzenbaum 45

Brockmeyer, Michael F.:
- Testimony 77
- Prepared statement 79
- Response to questions of Senator Metzenbaum 84

Budeiri, Priscilla:
- Testimony 64
- Prepared statement 66
- Response to questions of Senator Metzenbaum 72

Crawford, William:
- Testimony 118
- Statement of the Business Roundtable 120

Creighton, Joseph R.:
- Testimony 124
- Prepared statement on behalf of the Chamber of Commerce of the United States 126

Page

Kohn, Harold E.:
Testimony 89
Prepared statement 92
Response to questions of Senator Metzenbaum 100
Olson Farms, Inc. v. *Safeway Stores, Incorporated*, court case, U.S. Court of Appeals, Tenth Circuit, argued March 16, 1979; decided November 8, 1979 108
Long, Thomas R.:
Testimony 128
Prepared statement 130
Millstein, Ira:
Testimony 24
Prepared statement 29
Response to questions of Senators DeConcini and Metzenbaum 35
Polinsky, A. Mitchell:
Testimony 46
Prepared statement 48
Response to questions of Senator Metzenbaum 59
Rule, Charles F.:
Testimony 5
Prepared statement 9
Response to questions of Senator Metzenbaum 21

APPENDIX

Letters to Hon. Strom Thurmond, chairman, Committee on the Judiciary, from:
Louis F. Laun, president, American Paper Institute, Inc., August 2, 1985 137
James T. Halverson, chairman, section of antitrust law, American Bar Association, September 17, 1985 138
Enclosure: Report on Legislation Seeking To Apportion Damages Among Defendants in Treble Damage Litigation 139

INDIVIDUAL TREBLE DAMAGE LIABILITY — S. 1300

MONDAY, JULY 29, 1985

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10 a.m., in room SD-226, Dirksen Senate Office Building, the Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators McConnell, DeConcini, and Metzenbaum.

Staff present: Kenneth Starling, antitrust counsel, Robert Fiedler, Victor Maddox, and Steven Ross.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order. I dropped my glasses and a car ran over them. I have sent for some more. In the meantime, I have to use these dark glasses.

Today, we are holding a hearing on a bill I have introduced to restore fairness and equity to private antitrust law enforcement. I have introduced this legislation in order to remedy a problem of continuing concern in this area of the law

The purpose of S. 1300 is to ensure that those who engage in price-fixing conspiracies are held accountable for the injuries caused by their conduct.

At the same time, it will also alter the unfair and inequitable whipsaw effect of joint and several liability in antitrust suits.

This problem occurs when the largest defendants settle out of litigation early and inexpensively, leaving the remaining smaller defendants facing the prospect of bearing liability for three times the total injury caused by the conduct of all of the defendants.

In such situations, the risk of multibillion dollar liability has been simply too great to permit a small defendant to go to trial and take even a small risk of losing.

In my view, this kind of coercive effect on small defendants, coupled with the much lighter penalties paid by larger settling defendants, is unjust and unfair. I prefer to place liability where it belongs and keep it there.

Under this proposal, defendants in private antitrust suits would remain liable for treble damages, and I believe that this liability will pose sufficient deterrence to would-be price fixers. In order to restore equity to antitrust suits, that liability would be limited to three times the damages that an individual defendant caused, except in two situations.

The first situation is where any of the defendants has become bankrupt. The second is where any of the defendants is beyond the jurisdiction of the courts.

Without preserving joint liability in these situations, plaintiffs might be left without recourse for antitrust injury.

The unfairness posed by the combination of treble damage and joint and several liability in antitrust suits has been the subject of hearings and action by this committee in prior years.

The approach contained in this bill differs from the approach taken in earlier legislation and I am advised that there is substantial support for the direct, simple and equitable reform contained in S. 1300.

Our distinguished witnesses will share with us their views of the change proposed by this bill, and we look forward to their testimony.

Senator DECONCINI. Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Arizona.

OPENING STATEMENT OF SENATOR DENNIS DeCONCINI

Senator DECONCINI. Mr. Chairman, I am delighted to join you in supporting the enactment of the individual treble damage responsibility bill that you introduced on June 13th. I am proud to be a cosponsor with you. Your able leadership of the Judiciary Committee has proved invaluable in previous efforts to explore potential solutions to the problem of fairness in antitrust. It is a tribute to your leadership that the Individual Treble Damage Responsibility Act comes to the Senate with much of the groundwork already established for action on this very important reform.

I am proud to lend my support. Now, Mr. Chairman, it is clear that the time is right for Senate action on this type of legislation. The unfairness, as you pointed out, of the whipsaw tactics, is a problem that has been identified clearly and studied extensively.

The Congress is thoroughly familiar with the problem, the issue and the potential solution. The case for action has been made. The approach contained in this bill is preferable to other proposals debated over the years and will serve to enhance respect for the law while maintaining the purpose of the antitrust laws. Thank you, Mr. Chairman.

The CHAIRMAN. The able Senator from Arizona renders a great service on this committee. He and I have worked together on many matters, and I am very pleased to have his fine support and cosponsorship on this particular legislation.

Before I call the first witness I wish to place a copy of S. 1300 in the record.

[Text of S. 1300 follows:]

II

99TH CONGRESS
1ST SESSION

S. 1300

To provide for antitrust law violators to be subject to individual responsibility for treble the amount of damages attributable to their violations, and to assure fairness in the allocation and award of antitrust damages.

IN THE SENATE OF THE UNITED STATES

JUNE 13 (legislative day, JUNE 3), 1985

Mr. THURMOND (for himself, Mr. DECONCINI, Mr. LAXALT, Mr. HEFLIN, Mr. HATCH, Mr. SIMPSON, Mr. EAST, Mr. GRASSLEY, Mr. DENTON, Mr. MCCONNELL, and Mr. BAUCUS) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To provide for antitrust law violators to be subject to individual responsibility for treble the amount of damages attributable to their violations, and to assure fairness in the allocation and award of antitrust damages.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Clayton Act (15 U.S.C. 12 et seq.) is amended by inserting after section 4H the following new section:

"SEC. 4I. (a) The liability of any person under section 4 or 4C of this Act shall be limited to threefold the actual dam-

ages attributable to such person's purchases or sales of goods or services, where—

"(1) liability is based upon such person's participation in a contract, combination, or conspiracy among competitors, and

"(2) damages awarded are based upon the impact on price of such contract, combination, or conspiracy.

"(b) Subsection (a) shall not apply to that portion of damages—

"(1) attributable to any person that is beyond the jurisdiction of the United States district courts, and

"(2) which a claimant is unable to recover due to the financial incapacity of any person to satisfy a judgment for such damages.".

SEC. 2. The provisions of this Act shall apply to all actions commenced under section 4 or 4C of the Clayton Act after the date of enactment of this Act.

○

The CHAIRMAN. Now, our first witness today is the Honorable Charles F. Rule, Acting Assistant Attorney General, Antitrust Division, Department of Justice.

Mr. Rule, we are glad to have you with us and you may proceed.

STATEMENT OF HON. CHARLES F. RULE, ACTING ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. RULE. Thank you, Mr. Chairman and members of the committee. It is a pleasure to be here today to present the Department of Justice's views concerning S. 1300.

In brief, as you know, this bill, S. 1300, would eliminate joint and several liability for antitrust violations, when such liability is based on an agreement among competitors, and when damages are based on the effect of the agreement on price.

Where applicable, S. 1300 would limit the liability of antitrust violators to three times the actual damages attributable to their individual purchases or sales of goods and services.

Although the Department shares many of the sentiments that underlie S. 1300, we must oppose the bill because it would decrease the current appropriate level of deterrence for unambiguously bad pricefixing.

It would do little to decrease the objectionable overdeterrence of ambiguous competitive conduct such as nonprice vertical restraints, and it would create new issues and problems that may raise the administrative costs of applying the antitrust laws in private suits.

This morning, in my brief time, I would like to summarize our primary objections to S. 1300. First, we believe S. 1300 would likely raise plaintiffs' costs of, and lower the expected award from, suing price-fixing cartels. It will be more costly than is currently the case for plaintiffs to sue and collect damages from all members of a price-fixing conspiracy.

Moreover, it may prove difficult to establish when a particular defendant is judgment proof or beyond the court's jurisdiction, the exceptions provided in the bill. These increased costs and burdens likely will reduce the number of private treble damage actions against pricefixing.

Second, we believe that S. 1300 will decrease a price fixer's expected liability from participating in a felonious cartel and so decrease deterrence.

In some cases, for example bid rigging, S. 1300 may eliminate liability altogether for some defendants. This decrease in treble damage liability will largely be limited to per se pricefixing, and provide little relief to those who engage in competitively ambiguous rule-of-reason conduct.

We believe there is little to be gained by providing fairness to hard-core price fixers at the expense of higher prices to and less output for consumers.

I would like to close on a note of agreement, however, Mr. Chairman. The Department recognizes that the current regime of private antitrust remedies—treble damages, joint and several liability, and

plaintiffs' attorneys fees, may be unnecessarily stifling procompetitive and competitively neutral conduct.

A study of the effects of those remedies is currently under way. Any effort to reform antitrust remedies, we believe should focus on the larger picture, an attempt to minimize overdeterrence of possibly beneficial conduct while maintaining strong deterrents of per se horizontal antitrust violations. S. 1300, in our opinion, does not accomplish these goals.

Thank you. I will be happy to answer any questions the committee might have.

The CHAIRMAN. Mr. Rule, is there any detailed information that would provide a clear indication of whether eliminating joint liability would reduce deterrence?

Mr. RULE. Currently, as I think the members of this committee and some of the staff are aware, and as I have discussed with them, there is a study being undertaken at Georgetown University, and elsewhere, to try to determine the effects of the current treble damages rule. It is not clear what that study is going to show, but hopefully, it may give us some insight into the deterrent effect of current antitrust remedies.

I think though, by and large, that what we have said today, and our opposition, are based on more of a commonsense notion, that, if you reduce the number of antitrust suits against pricefixers, you will reduce the deterrence of them, and that when you increase the cost of bringing those suits, you are likely to decrease the number of suits brought.

The CHAIRMAN. All right. In your view, if S. 1300 ensured that antitrust violators would face certain liability for the damages they cause, corresponding to the magnitude of their sales, would it make a positive contribution to private antitrust enforcement?

Mr. RULE. If, for example, there were no reduction in the amount of overall liability that plaintiff could expect to recover, that is, if the amount that all the members of the conspiracy would be likely to pay remained the same under S. 1300 as under current law.

It is still not clear what effect this would have on deterrence. There is a great deal of literature on the whole question of risk aversion and risk preference among antitrust defendants.

If antitrust defendants tend to be risk averse, then a change in the law such as S. 1300 would probably decrease deterrence. If they tend to be risk neutral or risk preferrers it might increase deterrence. But, again that is an unclear question and so it is very difficult to answer.

The CHAIRMAN. Mr. Rule, in your written statement, you have said that it is good economic policy to arrange antitrust remedies in such a way as to encourage guilty defendants to settle quickly, even if this means that guilty defendants who settle early do relatively better than guilty defendants who settle late.

I wonder if your statement would still stand if it meant that guilty defendants who settle early do relatively better than innocent defendants who settle later?

Mr. RULE. Well, certainly, if what we are talking about is ambiguous conduct, that is, conduct whose effect on prices and consumers is ambiguous, we would be concerned.

However, since the bill is limited largely to agreements among competitors where the damages are based on sales, generally you are talking about pricefixing, horizontal pricefixing which is per se unlawful, and very little good can be said about it.

So, generally, we are talking about conduct where, if someone is liable, they have violated the antitrust laws. Now, it may be true that under certain circumstances you can coerce innocent defendants into settling, but again, we have not seen the evidence that that is the case or that what is happening here is subjecting innocent folks to greater liability and letting the real culpable folks off scot-free.

Of course, if we had information that that was the case, our view might change in some way.

The CHAIRMAN. The distinguished Senator from Arizona.

Senator DECONCINI. Thank you, Mr. Chairman. Mr. Rule, when is this infamous study due to be turned over to you?

Mr. RULE. Well, there is a conference being held, I think the first or second week of November, to discuss the progress of the study. I am not sure when the final results will be available, however.

Senator DECONCINI. When do you think it will be available? This year, or 1986, or 1987, or what?

Mr. RULE. I imagine, from what I know, that the study should be available toward the end of this year, perhaps early next year, although we will know more, I assume, after this November conference.

Senator DECONCINI. Will that study be available to members of this committee?

Mr. RULE. Yes, sir; it will be available generally.

Senator DECONCINI. Mr. Rule, if there are multiple defendants in an antitrust suit and one defendant can definitively be determined to be responsible for 1 percent of the actual price fixing, is it your position that if that defendant is found guilty he should be liable for the whole 100 percent, trebled?

Mr. RULE. I am saying that under the current law there is a good level of deterrence, and I think that when you are talking about price-fixing conduct that can harm consumers, unambiguously, and when you look at the ex ante level—that is, the expected level before one decides whether or not to get into a price-fixing cartel—of cost of engaging in such per se unlawful conduct, that it is not inappropriate to say that, under certain circumstances, somebody with a smaller than total responsibility in terms of sales for the conspiracy's price fixing can be liable for the total amount of damages. The point is that they are responsible.

If they have been found liable, it is hard to be terribly concerned about fairness for those individuals who have engaged in felonious conduct.

Senator DECONCINI. In response to my question then the answer is yes. A defendant determined to be responsible for 1 percent of the actual price fixing should be held liable for 100 percent trebled, if they are found guilty?

Mr. RULE. Well, let me put it this way: It does not trouble me, although I think generally that it is very unlikely that a 1 percent defendant is going to be found liable for the total amount of dam-

ages. It does not really trouble me, but I think joint and several liability has served well in the antitrust area——

Senator DECONCINI. That is true, that is exactly what joint and several liability would mean to that 1 percent defendant, right?

Mr. RULE. That is certainly true, yes.

Senator DECONCINI. Thank you, Mr. Chairman.

[Prepared statement and response to Senator Metzenbaum's questions follow:]

PREPARED STATEMENT OF CHARLES F. RULE

Mr. Chairman and Members of the Committee: I appreciate this opportunity to present the views of the Department of Justice on S. 1300, a bill "to provide for antitrust law violators to be subject to individual responsibility for treble the amount of damages attributable to their violations, and to assure fairness in the allocation and award of antitrust damages." S. 1300 would amend the Clayton Act to limit the liability, under sections 4 and 4C of that Act, of persons found to have violated the antitrust laws to three times the actual damages attributable to their individual purchases or sales of goods or services, 1/ where such liability is based upon a contract, combination, or conspiracy among competitors and where the damages are based upon the impact upon price of such contract, combination, or conspiracy. The limitation would not apply to that portion of damages attributable to any person beyond the jurisdiction of the United States district courts or that could not be recovered because of the financial incapacity of any person to satisfy a judgment for such damages. The Act would apply to actions commenced after the date of enactment of the legislation.

Concerns Raised by Existing Law Regarding Recovery of Damages

Although the antitrust laws are silent on how damages should be apportioned among co-conspirators, the federal courts have long taken the view that antitrust violations are tortious in character and, therefore, that all parties responsible for an antitrust violation are jointly and severally liable for all

---

1/ Read literally, S. 1300 could prevent the recovery by plaintiffs of their costs of suit, including reasonable attorney's fees, as well as prejudgment interest presently available under sections 4 and 4C of the Clayton Act. We do not believe that S. 1300 is intended to have this effect.

damages caused by their illegal acts. 2/ This means that an injured plaintiff can sue any or all of the perpetrators, or any combination of them, and can, in effect, apportion among them the obligation to pay damages in any manner plaintiff chooses. When a defendant settles with a plaintiff, only the actual amount of the settlement is deducted from the plaintiff's claim against the remaining defendants to prevent a double recovery of damages. 3/ However, in order fully to protect the Clayton Act's treble-damage remedy, this settlement amount is deducted from the plaintiff's claim against the other defendants only after the claim is trebled. 4/

Over the past few years, concerns have been expressed with regard to the spectrum of remedies available to plaintiffs in antitrust litigation. One concern stems from equitable considerations present in many joint-liability situations. As noted above, antitrust plaintiffs may proceed against any combination of co-conspirators--one, some, or all--and may recover treble damages from those defendants against whom they obtain a favorable judgment, regardless of such defendants' relative culpability or the benefits derived from the antitrust violation. Defendants required to pay more than their proportionate share of damages have no recourse against co-conspirators.

A second concern is more uniquely related to the special characteristics of antitrust treble-damage suits. Because only the actual amount of a settlement is deducted from the

---

2/ City of Atlanta v. Chattanooga Foundry & Pipeworks, 127 F. 23, 26 (6th Cir. 1903), aff'd, 203 U.S. 390 (1906); Burlington Industries v. Milliken & Co., 690 F.2d 380, 394 (4th Cir. 1982), cert. denied, 461 U.S. 914 (1983).

3/ Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 348 (1971).

4/ Flintkote Co. v. Lysfjord, 246 F.2d 368, 397-98 (9th Cir.), cert. denied, 355 U.S. 835 (1957); accord, Hydrolevel Corp. v. American Society of Mechanical Engineers, Inc., 635 F.2d 118, 130 (2d Cir. 1980), aff'd, 456 U.S. 989 (1982).

plaintiff's claim (trebled) against the remaining defendants, a settlement raises the expected liability of each of the remaining defendants. Accordingly, nonsettling defendants have substantially increased exposure following settlement by one defendant and feel additional pressure to settle. This is said to create a competition among defendants to settle early on favorable terms, perhaps forcing other defendants to settle later on terms that are less favorable. Moreover, it can be shown that this 'whipsaw' effect can result in larger total settlements for plaintiffs than would be the case in the absence of joint and several liability. 5/

A third, closely related concern is that because of uncertainties regarding whether particular business agreements constitute antitrust violations, some forms of conduct are overdeterred. 6/ While the risk of being held responsible for the entire amount of damages is appropriate when the agreement is a clear criminal violation, it may be inappropriate when competitively ambiguous behavior is involved.

These concerns arise not from any one aspect of the antitrust remedies available to plaintiffs but from the interaction of several: joint and several liability, treble damages, plaintiffs' attorneys' fees, and the like. In addressing these concerns, the goal should be to maximize deterrence of anticompetitive conduct, to minimize deterrence of conduct that is not anticompetitive, and to accomplish this task at the minimum administrative cost (litigation costs, attorneys' fees, etc.). We do not believe that eliminating joint and several liability for antitrust damages in cases

---

5/ See Easterbrook, Landes & Posner, Contribution Among Antitrust Defendants: A Legal and Economic Analysis, 23 J.L. & Econ. 331 (1980).

6/ See Polinsky & Shavell, Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis, 33 Stanford L. Rev. 447 (1981).

where liability is based on a contract, combination, or conspiracy among competitors is an effective method to accomplish this goal.

Providing Rights of Contribution and Claim Reduction

Numerous proposals to ameliorate the concerns discussed above have been made in the federal courts and in the Congress. Most of these have focused on creating rights of contribution and claim reduction in antitrust litigation. Contribution is an equitable doctrine that allows parties jointly and severally liable for damages growing out of a single cause of action to redistribute among defendants the responsibility for payment of damages. As applied to antitrust damage cases, contribution would allow a defendant who has had to pay more than its "fair share" of the damages resulting from an illegal restraint of trade to recover part of that payment from any other jointly liable co-conspirator who has paid less than its fair share. Claim reduction is another proposed method for spreading damages proportionately among jointly liable co-conspirators. It would apply whenever any of the defendants enters into a settlement with the plaintiff and involves deducting that defendant's proportionate share of the damages, rather than only the amount of the settlement, from the plaintiff's claim against the remaining defendants.

Lower federal courts have traditionally denied rights of contribution in antitrust cases. The reasons have included concern with contribution's effects on deterrence, the complexity it would add to private antitrust litigation, and the absence of clear congressional authorization of such a remedy in light of traditional common law doctrine. 7/

7/ See, e.g., In re Corrugated Container Antitrust Litigation, 84 F.R.D. 40 (S.D. Tex.), aff'd, 606 F.2d 319 (5th Cir. 1979), cert. dismissed, No. 79-792 (Oct. 20, 1980); Olson Farms, Inc. v. Safeway Stores, Inc., 649 F.2d 1370 (10th Cir. 1979); El Camino Glass Co. v. Sunglo Glass Co., 1977-1 Trade Cas. ¶ 61,533 (N.D. Cal. 1976); Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. 1339 (S.D.N.Y. 1969). Contra, Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979).

Ultimately, the Supreme Court decided that contribution was not available in antitrust damage actions in the absence of congressional authorization. 8/ Based upon the Supreme Court's Texas Industries rationale, lower courts have held that claim reduction in antitrust damage actions is similarly unavailable. 9/

Legislation to create rights of contribution and claim reduction in antitrust damage actions has been regularly introduced in Congress in recent years. 10/ These bills would have created rights of contribution and claim reduction in damage actions brought against price-fixing violations pursuant to sections 4, 4A, or 4C of the Clayton Act.

The Department believes that before any legislation affecting the allocation of antitrust liability among defendants (whether contribution, claims reduction, or the elimination of joint and several liability) is adopted, the effects of the legislation on antitrust enforcement must be taken into account. Several factors bear on this issue. Most important are the effects on deterrence analyzed (1) from the point of view of a potential defendant assessing both the likelihood and magnitude of its liability for antitrust damages, and (2) from the plaintiffs' vantage point where changes in the costs of litigation and in the amount of damages received will affect expected recoveries. Moreover, to the extent a change in damage allocation rules provides relief to businesses engaged in felonious antitrust activities as opposed to those businesses engaged in competitively ambiguous conduct subject to the rule of reason, that change will affect only

---

8/ Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981).

9/ Burlington Industries v. Milliken & Co., supra note 1.

10/ See, e.g., S. 380, 98th Cong., 1st Sess. (1983); S. 995, 97th Cong., 1st Sess. (1981); S. 1468, 96th Cong., 1st Sess. (1979).

conduct that has no merit and cannot be overdeterred. In addition, other possible effects of the legislation should be considered, including, for example, effects on settlements and effects on the costs of administering the judicial system. The Department does not have sufficient information at this time properly to assess these effects from the enactment of S. 1300. Consideration of these factors leads us to conclude that eliminating joint and several liability--the approach embodied in S. 1300--is not a desirable legislative reform.

Eliminating Joint and Several Liability

S. 1300's approach to addressing the concerns raised by the panoply of relief available to plaintiffs in antitrust damage actions is to eliminate joint liability for certain types of antitrust damages. In essence, each defendant engaged in a horizontal price-fixing conspiracy would be liable for no more than three times the damages caused by its own conduct. This would effectively insulate such defendants from the concerns of having to pay more than treble the damages directly attributable to their own sales. While S. 1300 may have some "fairness" appeal, it is difficult to quantify the benefits to society from being "fair" to antitrust felons. Antitrust defendants who truly deserve to be treated "fairly"--persons engaged in procompetitive or competitively ambiguous conduct--would seldom be able to invoke S. 1300. 11/ Thus, S. 1300 would at best only partially--and very imperfectly--address the concern that the current rule of joint

---

11/ S. 1300 would apply and provide relief to parties engaged in procompetitive horizontal arrangements (such as efficiency-enhancing joint ventures) that had inaccurately been characterized as anticompetitive "contracts, combinations, or conspiracies" among competitors. It would not, however, provide relief to parties engaged in procompetitive arrangements that are "purely vertical" and involve no agreements among direct competitors.

and several liability exposes antitrust defendants to possibly excessive damage liability.

On the other hand, as I will explain, eliminating joint and several liability likely would reduce deterrence. Because S. 1300 would apply primarily to horizontal price fixing violations--conduct that is always anticompetitive--such a negative effect on deterrence would, we believe, be highly undesirable. It is our position that this undesirable effect of S. 1300 clearly outweighs the arguably beneficial effect of reducing individual defendants' damage exposure--a benefit that would, in any event, principally accrue to culpable individuals who had intentionally participated in criminal conspiracies.

I will now examine the factors that bear on deterrence. From the point of view of a firm considering whether to enter into an antitrust conspiracy, the most important determinant will be the difference between its expected gain from the conspiracy in added profits over the conspiracy's duration and its expected costs from being sued and having to pay damages. Thus, from a potential defendant's perspective, deterrence is a function of (1) the likelihood of being sued, (2) the risk of being found guilty, and (3) the amount of damages for which it could become liable.

The likelihood of being sued depends primarily on the risk of detection and the incentive that plaintiffs have to sue, which in turn depend on the expected return to potential plaintiffs of private litigation. Any reduction in their expected net recovery--either as a result of reduced liability on the part of defendants for damages or increased costs of proving and collecting such damages--will reduce private plaintiffs' incentives.

S. 1300 would reduce plaintiffs' incentives to invest in detection and to bring suit in at least three respects. First, eliminating joint and several liability increases a plaintiff's

incentive to name all liable parties as defendants once a decision has been made to sue, because otherwise the plaintiff will be unable to collect its full measure of damages. Suing every member of a conspiracy, however, likely costs more than suing some lesser number. Moreover, plaintiffs would also be required to incur the costs of collecting damages from each co-conspirator after judgment. With joint liability, plaintiffs need only prove their damages from the conspiracy as a whole; without joint liability, they will have to prove damages against each member of a conspiracy individually. Because of these increased costs, the elimination of joint and several liability would tend--at least at the margin--to reduce the number of private antitrust suits.

Second, the inability of plaintiffs to collect their full measure of damages where some defendants are insolvent or beyond the jurisdiction of the court would also reduce their incentive to detect violations and bring suits. S. 1300 deals with this problem by providing that its provision eliminating joint and several liability would not apply to damages attributable to such defendants. Presumably, the plaintiff would have the burden of proving that a defendant met these criteria. S. 1300 leaves open such questions as when a defendant is sufficiently financially incapacitated so that other defendants are liable for its damages, what efforts a plaintiff must make to secure a defendant's appearance in court or prove lack of jurisdiction, and whether remaining defendants are jointly liable for such damages or only for some proportional amount of them.

Third, one potential element of antitrust damages might be eliminated by legislation making defendants liable for no more than three times the damages attributable to their own conduct. Plaintiffs in some jurisdictions may be able to recover damages incurred when nonconspirators raise their

prices in reaction to the price increases resulting from the conspiracy. Such so-called "umbrella" damages are theoretically caused by the conspiracy and recoverable from the conspirators. To date, several courts have found that the difficulty in tracing such damages is too great to permit their recovery, while others are still considering the matter. Legislation making defendants liable only for treble the damages caused by their own purchases or sales would necessarily preclude the possibility of recovering damages under an umbrella theory.

In sum, since the expected net recoveries of plaintiffs would be reduced if joint and several liability is eliminated, the overall incentive of private plaintiffs to detect antitrust violations and to bring antitrust damage actions would decline. If that happened, the first component of deterrence--a potential conspirator's estimation of the likelihood of being sued if it engages in the conspiracy--would also decline.

The second component of deterrence--the risk of being found guilty--might or might not be affected by S. 1300, depending on the circumstances. Eliminating the whipsaw effect caused by some settlement tactics might encourage defendants to maintain a united front and prevent plaintiffs from obtaining assistance or evidence from one defendant in return for a nominal settlement. It is difficult to assess the likelihood or magnitude of this effect, however, and in doing so, one must remember that the perceived unfairness of the "whipsaw" tactic is what has, in substantial part, engendered the legislation before the Committee.

The third component of deterrence--a prospective conspirator's estimation of the magnitude of its potential liability if it is sued and found guilty--would likely decrease if joint and several liability is eliminated. Because under S. 1300 a price fixer generally will be liable for no more than

treble the damages attributable to his sales while he currently can be liable for up to the total amount of damages caused by the price-fixing conspiracy, the total amount for which he is likely to be liable will decrease. To some extent, the adverse effect on deterrence will be mitigated because S. 1300 means that once a conspiracy is detected and sued, a particular member of the conspiracy is more likely to be sued. However, because S. 1300 may increase the cost to plaintiffs of bringing antitrust suits against price-fixing conspiracies, the probability that a particular conspiracy will be detected and sued privately may decrease. The net effect will likely be that the expected (ex ante) cost of private antitrust liability to a price fixer will be lower under S. 1300 than under the current state of the law. 12/ Accordingly, it would be more likely to engage in a violation than it would have if liability were joint and several.

It should also be pointed out that for a particular subset of potential conspirators, S. 1300 might do more than reduce the level of deterrence; it might eliminate it entirely. S. 1300 would make each person engaged in a horizontal price-fixing conspiracy liable only for three times the damages attributable to its own purchases or sales. In many bid-rigging conspiracies, the quid pro quo for certain conspirators' not bidding or submitting complementary bids is either a subcontract or a cash payment, i.e., these co-conspirators make no sales subject to the conspiracy. Under S. 1300, therefore, they would not be liable for any damages, while the company that wins the bid would be liable for all of the damages arising from the violation. However, with joint

---

12/ To some degree, the effect on deterrence of eliminating joint and several liability depends upon the extent to which firms are risk averse--a proposition that produces endless debate among scholars. Given the uncertainty concerning this point, we do not discuss risk aversion in this testimony.

and several liability the winning bidder is already liable for all the damages arising from the conspiracy. Thus, the winning bidder's risk would remain substantially unchanged while its co-conspirators' risks of being sued or liable for damages would be eliminated, and deterrence of this particularly virulent type of price-fixing conspiracy could be considerably reduced.

In sum, eliminating joint and several liability for antitrust damages would diminish plaintiffs' incentives to bring private damage actions and reduce deterrence. The beneficiaries of this change would be that class of antitrust defendants who least engage our sympathy: those accused of horizontal conspiracies affecting price. These violations are clearly anticompetitive, intentionally committed, and criminal in nature. They have no redeeming social value and are there is no evidence that they are not being overdeterred.

In the six years that Congress has been considering legislation to provide rights of contribution and claim reduction or to eliminate joint and several liability in antitrust damage actions, the existence of abuses--of innocent defendants denied an opportunity to litigate their innocence or of relatively less culpable though guilty defendants being required to pay far more than treble the damages caused by their own conduct--remains largely theoretical and anecdotal. Making people who engage in price fixing conspiracies pay substantial damages is good economic policy and so is arranging antitrust remedies in such a way as to encourage guilty defendants to settle quickly, even if this means that guilty defendants who settle early do relatively better than guilty defendants who settle late. Accordingly, given the importance of deterring clear cut, collusive antitrust violations, we cannot support S. 1300.

Although we oppose S. 1300, we share Congress' interest in exploring possible reforms to antitrust damage rules. We recognize that treble damage liabilty combined with joint and several liability may overdeter socially beneficial business activity subject to the rule of reason. Rule of reason challenges by their very nature involve both procompetitive and anticompetitive conduct that must be balanced, and many involve conduct that proves to be predominantly procompetitive. If the litigating powers provided plaintiffs unduly prevent defendants in rule of reason cases from testing the legality of their conduct, legitimate, procompetitive conduct may be discouraged and the economy as a whole be made worse off. Plaintiffs injured by conduct judged anticompetitive under the rule of reason deserve recompense, but defendants engaged in such conduct need not be punished or inhibited from testing the limits of the law. A legislative approach to these concerns would go beyond the limited range of cases covered by S. 1300.

Joint and several liability for damages is only one of a number of reasons why antitrust plaintiffs may be perceived to have an excess of litigating power in certain instances--treble damages and attorneys' fees for plaintiffs only are certainly two others. Changes in either of these other areas would shift the balance of power between plaintiffs and defendants without incurring the cost or complexity of eliminating joint liability. More importantly, they could be used to provide relief targeted more directly at improving the competitive strength of our economy by reducing overdeterrence of procompetitive conduct. Studies are currently under way to examine the entire area of relief in antitrust cases. Joint and several liability is only one factor in this larger picture of antitrust remedies, one that cannot be dealt with in isolation from the others. We believe it is better to wait until it is clear where the entire field of antitrust relief is headed before enacting legislation that would have the impact of S. 1300.

Mr. Chairman, this concludes my prepared presentation. I would be happy to respond to any questions the Committee may have.

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

11 MAR 1986

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am pleased to respond to your letter of July 30, 1985, to then Acting Assistant Attorney General Rule requesting answers to questions posed by Senator Metzenbaum concerning the Committee's hearings on S. 1300. Mr. Rule's answers are enclosed. Please do not hesitate to contact me if I can be of any further assistance.

The Office of Management and Budget has advised that there is no objection to the submission of these responses from the standpoint of the Administration's program.

Sincerely,

John R. Bolton
Assistant Attorney General

Enclosure

Questions Posed by Senator Metzenbaum to
Charles F. Rule, Acting Assistant Attorney General,
Antitrust Division, Concerning S. 1300

Q.1. Has Mr. Ginsburg, your successor, read and approved of your testimony?

A. Yes, he has. Mr. Ginsburg agrees with the Department's position on S. 1300 as expressed in my testimony.

Q.2. Professor Polinsky claims in his written testimony that independent parallel conduct is deterred by current laws. Do you agree? Is this significant for consumers? If he's correct, wouldn't this mean that we should also consider reducing criminal penalties for price fixing?

A. Legitimate concerns about overdeterrence of price fixing or any other potentially socially harmful conduct can arise if (1) the potentially socially harmful conduct also may produce social benefits, or (2) the socially harmful conduct resembles socially beneficial conduct and persons engaging in the socially beneficial conduct may be mistakenly deemed to have engaged in the socially harmful conduct. Neither condition is sufficiently likely in the case of price fixing to warrant a reduction in the level of deterrence of price fixing. While it may be true that parallel pricing (which can be socially beneficial or socially harmful depending upon the circumstances) can be confused with price fixing, the evidentiary standards in price-fixing cases, which require more than mere parallel pricing to prove a horizontal conspiracy, greatly reduce the likelihood that courts will confuse innocent parallel pricing with per se illegal horizontal price fixing.

Although not significant in the area of price fixing, the issues raised by Professor Polinsky are important in a general consideration of antitrust penalties. In deciding whether to undertake a particular course of conduct, a firm will estimate the likelihood that such conduct would be found to be illegal and the penalties that would be imposed in that event. The firm will select a particular course of conduct based on its estimates of costs and benefits including legal penalties. Potentially beneficial activities might be deterred if they are illegal themselves or may be mistaken for illegal activities. Both possibilities clearly are present in the antitrust area. To avoid overdeterrence of such conduct, it is necessary to place reasonable limits upon the penalties imposed on those found liable. If the legal system operates costlessly and without error, then the socially optimal penalties (civil or criminal) should equal the cost to society from the conduct divided by the probability that the conduct will be detected and found liable. If socially beneficial conduct is frequently mistaken for prohibited conduct, then the appropriate penalty is less.

These principles are of little practical use in selecting particular penalties for particular violations because both the cost to society and the probability of liability are difficult to estimate accurately. However, these principles do provide insights into the appropriate penalties for certain types of antitrust violations relative to others. Since price fixing is concealable and, thus, is more likely to escape detection, it

should be punished more severely than nonconcealable conduct. Moreover, the penalties should be greater for price fixing than for other antitrust violations because socially beneficial conduct is not likely to be mistaken for price fixing but may be mistaken for other antitrust violations. Indeed, the Administration has recently proposed revisions to the damages provisions of sections 4 and 4A of the Clayton Act that would accomplish that result.

Thus, Professor Polinsky's arguments do not persuade me that price fixing is overdeterred, and I oppose any reduction in the criminal penalties for price fixing. His arguments, however, have far more relevance to other areas of antitrust not addressed by S. 1300, and would support reductions in penalties for other antitrust violations.

Q.3. Mr. Kohn argues in his written testimony that S. 1300 will make it much more difficult for consumers to bring class actions. Assuming he is correct, how do the imposition of rules that make it harder or less attractive for plaintiffs to sue affect the public interest in eliminating price fixing?

A. Without taking a position on whether S. 1300 would have the impact on Rule 23 class action litigation posited by Mr. Kohn, anything that makes it more difficult or more costly for potential plaintiffs to bring and win damage cases will decrease the willingness of potential plaintiffs to undertake litigation. It also is possible that potential plaintiffs would be less willing to sue for damages in the event that a violation were uncovered. Both effects, in turn, make potential violations more likely because expected penalties are reduced. Because S. 1300 would apply almost exclusively to horizontal price-fixing violations--which are unambiguously anticompetitive--the reduction in deterrence that would result if S. 1300 were enacted would be contrary to the public interest for the reasons discussed in my answer to the previous question.

Let me reemphasize, however, that the same is not necessarily true with respect to conduct that is competitively ambiguous or potentially procompetitive, conduct that is or that ought to be subject to scrutiny under the rule of reason. Such conduct can be overdeterred and may, in fact, be overdeterred, and it is for this reason that the Administration has developed and submitted a proposal for reform of the current treble damage rule in antitrust cases.

Senator McCONNELL [presiding]. I am going to preside for a moment in the chairman's absence. I would like to insert into the record an opening statement of my own, to be placed at the appropriate place.

[The statement follows:]

PREPARED STATEMENT OF SENATOR MITCH MCCONNELL

Mr. Chairman, I want to thank you for the opportunity to participate in this hearing today, and to commend you once again for your leadership in focusing the committee's attention on the subject. This bill, S. 1300, would provide for antitrust law violators to be subject to individual responsibility for treble damages attributable to their violations of the law. As such, it is designed to bring a greater degree of fairness to the allocation of damages in antitrust cases.

As in so many other aspects of the antitrust field, doctrines have grown up that may have been appropriate to the problem when initially announced 30, 50, or even 80 years ago. Yet these same doctrines are in some cases entirely inappropriate for the modern business environment, especially when that environment is molded by legal forces that include extensive use of class actions and lawsuits that commonly involve multiple defendants.

Recently, this committee held hearings of a similar nature in connection with the way the antitrust laws affect foreign commerce and the competitiveness on American business that must compete with foreign industry. This hearing continues the practice this committee has followed of reexamining the law of antitrust when circumstances warrant reexamination.

I am pleased to be a cosponsor of S. 1300, for I believe it to be a reasonable solution to a serious problem, one with potentially ominous implications for American competitiveness. I do not believe that the Congress, in 1890, intended for the Sherman Act to subject a single antitrust defendant to liability for an entire industry's treble damages. If it did, I don't believe this Congress ought to allow the situation to go unchanged, knowing what we do now about the reality of antitrust actions and the civil litigation process.

This bill provides the kind of balanced approach the law demands—reasonable limitation on the potential liability of an individual defendant, coupled with full protection of the plaintiffs' rights to receive their full treble damage award. I'm pleased to see the bipartisan support this committee has shown for the bill, and look forward to supporting it.

Thank you, Mr. Chairman.

Senator McCONNELL. Are there any additional questions for Mr. Rule?

Thank you very much, Mr. Rule.

Mr. RULE. Thank you.

Senator McCONNELL. The next witnesses are a panel consisting of Judge Griffin Bell, Ira Millstein, and A. Mitchell Polinsky.

Gentlemen, if you have prepared texts, we will be glad to insert those in the record, and we would urge you to summarize your remarks, and I want to welcome the former Attorney General before us this morning, and Judge Bell, we will start with you.

Judge BELL. I think Mr. Millstein will lead off.

Senator McCONNELL. All right. Any way you want to do it.

STATEMENT OF A PANEL CONSISTING OF JUDGE GRIFFIN B. BELL, KING & SPALDING, ATLANTA, GA; IRA MILLSTEIN, WEIL, GOTSHAL & MANGES, NEW YORK, NY; AND A. MITCHELL POLINSKY, JOSEPHINE SCOTT CROCKER PROFESSOR OF LAW AND ECONOMICS, STANFORD UNIVERSITY SCHOOL OF LAW, STANFORD, CA

Mr. MILLSTEIN. My name is Ira Millstein. I am a senior partner in the New York law firm of Weil, Gotshal & Manges. I am a former chairman of the American Bar Association's antitrust law

section, and the New York State Bar Association's antitrust law section.

My statement is in the record and I am not going to repeat it. First, I would like to personally thank the chairman, and the 10 Senators who joined in introducing S. 1300, for forging what I consider to be a very rational and simple solution to the well-recognized problem of allocating damages in certain antitrust cases.

S. 1300 is a reform whose time has finally come. It is no wonder that it enjoys widespread support throughout the business community and the bar, and has engendered so little opposition. You are to be complimented.

Second, while Judge Bell and Professor Polinsky will describe the affirmative attributes of S. 1300, I would like to use my few minutes to respond to some of the questions and criticisms I have seen raised in the testimony of others, and particularly by Mr. Rule this morning.

One of the witnesses who will testify later asserts that no one has yet demonstrated that any such bill is necessary. I join Senator DeConcini in failing to understand how anybody could make a statement like that. This very committee, in issuing Report No. 97-359 on S. 995 in April 1982, after days of hearings, and after hearings in two previous Congresses, and after months of personal visitations, in which Judge Bell and I were participants and opponents, if you will, this committee concluded, with virtual unanimity, that there was in fact a serious problem, that whipsaw settlement tactics were an abuse of the system, and that it was necessary to—using the words of the committee—"restructure the manner in which damages are apportioned in these types of cases", to introduce—and again using the words of the committee—"elements of fairness and rationality, as well as deterrence, into the litigation process."

So it is unquestionable in my mind that this committee had no doubt that there was a problem in search of a solution back in 1982, and even in the prior Congresses, and there cannot be any doubt that that issue has not gone away.

All one needs to do is look back at the earlier hearings to know that a problem existed. Permit me to provide just a brief reminder, which I am sure each of the Senators and everybody in this room will remember, of the facts, as distinguished from the theories adduced at those hearings. You will remember the coercive tactics and the whipsaw, and you will remember the two small companies, Green Bay Packaging and Menasha Corp., who were forced to pay huge settlements rather than risk trial and liability in attempting to prove themselves innocent, because they could not afford to take the chance that they would be held liable for the entire industry's sales. And then, Green Bay and Menasha were subsequently held in trials not to have been involved in the conspiracy. Now that may not bother Assistant Attorney General Rule, but it bothers me very much.

I consider that to be a whipsaw and abusive; I consider that to be something in need of reform, and I consider the fact that a 1 percent seller may pay 100 percent of the damages to be something that the antitrust system should not countenance. We should do

something about it, and this committee has wanted to do something about it.

It seems to me that this disposes of any assertion that this committee, indeed this Congress, does not have a replete record from which to conclude that this part of the remedy system needs to be restructured.

I should note that Mr. Rule has surprisingly decided that S. 1300 does not do the trick, but nevertheless, he says, he recognizes that treble damage liability, combined with joint and several liability may overdeter socially beneficial business activities. Well, Mr. Rule understands there is a problem and he understands that something should be done about it, but he urges you to do nothing yet. Wait again, he suggests, something better is going to come along.

I am a founding member of the Board of Advisors of the Georgetown study of private antitrust litigation Senator DeConcini, I was there at the beginning of the Georgetown study, and I would like to call your attention to the fact that it was never intended to develop uniform conclusions.

Moreover, it deals with detrebling and attorney's fees, and the costs of litigation, and is not primarily involved with the issue of joint and several liability. Just as economists differ, we fully anticipate that the papers that come out in the Georgetown study, which primarily will not deal with joint and several liability, are going to differ. That was the whole purpose of the study, to have a study by people with different points of view, to spread them on the table, and, as I said, they are not going to focus on joint and several liability.

You have focused on joint and several liability and you know what the problem is, and that it needs a solution. The Georgetown study is not going to change this. What Mr. Rule is suggesting is that you wait, and that possibly we have more far-reaching reforms.

I suspect that he would like to see detrebling in rule of reason cases. Fine. That will come 2 years, 3 years, or 4 years from now, but it has nothing to do with this issue, and I would strongly urge you not to be derailed again by the promise that something better is coming along down the road that is going to fix this all up.

Georgetown is not. It is examining the issue of detrebling in rule of reason cases, and I am virtually certain that that is what Mr. Rule would like, but it has nothing to do with this.

Now, the problem up to now has been finding a solution to the type of problem which everyone knows exists, the abusive whipsawing tactics.

I suggest to you that you have a complete record, after three Congresses, to know that what S. 1300 does, does the trick.

Now, putting aside theories and speculations of the type put forth by Mr. Rule, your facts and your experience should tell you that S. 1300 transforms a very capricious standard for allocating damages among defendants, without regard to fault, without regard to size, without regard to market share, into a system which says each member of a conspiracy has to pay its fair share of the damages. What could be fairer? No longer can plaintiff's counsel, by whim or design, choose to favor a conspirator by not suing that conspirator or by settling quickly and cheaply with that conspira-

tor, and nevertheless, holding the rest of the defendants hostage for the total industry's sales.

Some plaintiff's counsel call this power flexibility on their part. I call it, and the record demonstrates that it is unfair and coercive, and an abuse of the system.

This brings me to the assertion by some, including Mr. Rule, that deterrence will be lessened by S. 1300, or that it is unclear as to what impact on deterrence will be had by S. 1300.

Professor Polinsky is going to deal with this in his testimony, but I would only like to add an element of what I hope is common sense.

Remember that in this area, what the economists are bringing to you is not empirical data of any kind or nature. There is not any which shows anything one way or the other.

The traditional role of economists is to bring you facts; but, here, they do not bring you facts. The economists are simply telling you that applying their own respective brand of logic, they conclude, some of them, that deterrence will be decreased. Others, applying their brand of logic, say deterrence will be increased. They are all simply reasoning and applying logic with you; they are not giving you empirical data.

Now economists, including Mr. Rule, have no monopoly on logic and reasoning, and empirical data is not necessary to decide this issue.

If I were you, if I were a legislator, I would rely on my own plain common sense. Mr. Rule frankly conceded in his testimony a few minutes ago that he was relying on nothing other than his common sense.

I would suggest to you that your common sense is at least as good as his common sense, and indeed, your common sense, it seems to me, is a little better, because it is based upon years of experience in hearings and many facts.

I think common sense tells us that deterrence is likely to be increased under S. 1300. It is more likely that a conspirator will be joined in the suit, because if he is not, his sales are out of the case; and it is more likely that if he is joined, he is going to pay a fair share of the damages, because if he does not, his sales are out of the case.

Accordingly, plain common sense tells me, and should tell you, that conspirators under S. 1300 are more certain to pay, and if they are more certain to pay, the deterrence factor increases. I do not think the logic is any more complicated than that.

Another criticism offered by opponents is, and Mr. Rule said it, that there is no reason to favor price fixers as distinguished from other types of antitrust violators. That is a most peculiar criticism. The legislation is faulted because it does not go far enough, it is too narrow, and it only covers some types of violations.

It seems to me the answer is simple again. It is easy to allocate damages in a horizontal conspiracy case where purchases and sales are involved and damages depend on price. It is enormously complex to allocate damages in other types of cases, but more importantly, the documented abuses occur almost always in the horizontal price cases covered by S. 1300.

Why stretch the bill, with great complexity, to cover situations which do not appear to generate the abuses which we are all looking at?

And finally, it is asserted by some opponents that S. 1300 will cause some unknown problem with rule 23 class actions. I do not see it, it surely is not intended, but if the committee thinks there is some problem there, it's simple enough to create legislative history saying that Congress does not intend to impact rule 23, and the legislation therefore will not impact it.

I conclude by again commending the chairman and all of the cosponsors for finally forging a solution in S. 1300, which has drawn a true consensus. S. 1300 is in the public interest. It cures the most patent abuses and, at the same time, improves deterrence. I think these hearings and those which have preceded them in two prior Congresses bear out these conclusions. I urge you not to be derailed by an empty suggestion of something coming down the road which is going to point to a better solution. You have a solution in front of you, it is the correct solution, and it should be promptly passed. Thank you.

[Statement and reply to letter of Senator Thurmond follow:]

PREPARED STATEMENT OF IRA M. MILLSTEIN

Good morning. My name is Ira Millstein. I am a senior partner, specializing in antitrust law and litigation, at the law firm of Weil, Gotshal & Manges, and a Fellow of the Faculty at Harvard University's John F. Kennedy School of Government. I am also a former Chairman of the American Bar Association Section on Antitrust Law. The views I will express today are my own, and do not necessarily represent the views of my law firm or any Bar Association or other organization.

I am delighted to be here to express my strong support for S. 1300. Much thought and effort has gone into this badly needed antitrust reform legislation, and I am appreciative of the opportunity you have provided me to present what I believe are the compelling arguments in its favor.

Two years ago, I wrote an article with my partner, Jeffrey Kessler, describing the pressing need for antitrust remedies reform.[1] We pointed out that although the unplanned combination of joint and several liability with mandatory treble damages had resulted in unfair abuses which undermined antitrust policy, no clear consensus had yet emerged as to the best approach for dealing with these problems. Complicating the matter, of course, was the divisive issue of "retroactivity", which made it impossible for any antitrust remedies reform measure to pass during the last two Congresses.

Since that time, I have had many discussions with members of the business community, the bar and members of Congress in an effort to develop a consensus approach to

---

1. I. M. Millstein and J. L. Kessler, "Integrated Reform Suggested for Antitrust Remedies," Legal Times, June 27, 1983 at p. 29.

remedying the abusive results which emanated from combining joint and several liability with mandatory trebling of damages. There was a general agreement that the problems were real and serious; but a new approach had to be developed which would both solve those problems and unite all of the interests previously divided by the bitter division which had occurred over contribution legislation. Eventually, at the behest of various clients, I joined forces with Judge Griffin Bell and the two of us set out to determine whether a real consensus could be achieved. He and I had been on opposite sides of the earlier dispute concerning proposed contribution legislation; and we hoped that resolving our past differences would help bring together all those who saw the problems and sought a solution.

We quickly discovered that there was, in fact, a strong desire within the business community, the bar and Congress to try to agree upon the best approach for remedying what virtually everyone saw as an abuse of the law. We attended meeting after meeting at which the pros and cons of various reform proposals were discussed, debated and analyzed. In almost every meeting, the existence of the abusive problem was accepted as a given, as it had been earlier when contribution legislation was proposed. Finally, a consensus developed in support of a single reform proposal: individual treble damage responsibility. In my view, that proposal, which is embodied in S. 1300, is precisely the right approach. It would provide the simplest, fairest and most effective solution to the problems which have been clearly identified and described.

Before I discuss the solution provided by S. 1300, however, let me remind you, briefly, of the abuses which it is intended to cure.

The adverse and unintended consequences of combining joint and several liability with mandatory treble dam-

ages, nationwide class actions and lenient standards of antitrust proof, have been well-documented in previous hearings before both this Committee and the House Judiciary Committee.[2] The abusive "whipsaw" tactics made possible by this combination and the unfairness of having some antitrust defendants pay less than their fair share of damages while others are threatened with crushing industry-wide liability -- regardless of their size or culpability -- is well known to this Committee.[3] I would just like to add one example of my own which underscores the problem.

In the late 1960's, my law firm represented a small book publisher in the Library Editions of Children's Books cases.[4] It, along with a group of mostly larger book publishing companies, was sued for alleged price-fixing. Now this was a small company. It could not even afford to have me attend all defense counsel meetings. So when the large companies, one by one, made their earlier settlements, leaving their sales "in" the case, I had to advise my small publisher about the enormous risks that it would face in being left holding the bag should it try to defend itself and lose at trial. The small publisher, by virtue of the earlier settlements, was left potentially liable for damages on a volume of sales far in excess of its own actual sales. Faced with such risks, the client concluded that it couldn't possibly afford to litigate its innocence. An adverse judgment would mean that it would surely be financially

---

2. See, e.g., The Antitrust Equal Enforcement Act: Hearings on S. 995 Before the Senate Comm. on the Judiciary, 97th Cong., 1st and 2d Sess. (1981-82); Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 97th Cong., 2d Sess. (March 16, 1982); Antitrust Equal Enforcement Act of 1979: Hearings on S. 1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. (1979).

3. See Report of the Senate Judiciary Committee on S. 995, S. Rept. No. 97-359, 97th Cong., 2d Sess. (1982).

4. See In re Library Editions of Children's Books Antitrust Litigation, 297 F. Supp. 385 (J.P.M.D.L. 1968).

ruined. So the client had to plead with the plaintiffs for the best settlement that it could get -- moderate by any standard except his. As a result of the litigation expenses and the settlement that the client had no choice but to agree to, its business was crippled anyhow, and it ultimately went out of business.

To me that is an abuse of the system. Antitrust defendants should not be denied their day in court because they cannot risk being held liable for the treble damages caused by others. Nor should antitrust plaintiffs be able to engage in whipsaw settlement tactics which reallocate treble damage liability amongst defendants without regard to culpability. Indeed, it makes no sense, from the standpoint of antitrust policy, to place in the hands of private plaintiffs the discretion and power to allow some antitrust violators to pay little, or even nothing at all, while other defendants are threatened with an entire industry's treble damages.

S. 1300 provides an ideal solution. It strikes at the heart of the problem caused by the combination of joint and several liability with treble damages, class actions and lenient standards of proof, by modifying just one of these elements -- joint and several liability -- to provide for individual treble damage responsibility. Under this proposal, each company's treble damage liability would reflect the individual consequences of its own actions, and every antitrust defendant would have to stand or fall on the strength of its own defense. Yet, S. 1300 would still preserve joint and several liability in those few situations where it may be necessary to make plaintiffs whole.

In enacting the antitrust laws, Congress chose to punish wrongdoers and enhance deterrence by imposing treble damages. Joint and several liability was added in 1903, not by Congress, but by the courts, and with absolutely no

analysis of its consequences.[5] Joint and several liability was not intended to be another penalty. Rather, as explained by the Supreme Court, it was simply designed to insure "that the plaintiffs will be able to recover the full amount of damages from some, if not all, participants."[6] This remedial objective is fully accomplished by limiting joint and several liability, as S. 1300 does, to the two categories of cases in which a plaintiff might not otherwise be able to recover its damages: (i) where a co-conspirator is beyond the jurisdiction of the United States; or (ii) where a co-conspirator is financially incapable of paying an antitrust judgment against it. In all other cases, a plaintiff can fully recover by simply joining as a defendant, and collecting a fair share of damages from, each company alleged to have been a part of the conspiracy which caused the injury.

S. 1300 is also ideal because it is narrowly tailored to provide the greatest amount of benefit at the least cost. It would only apply to cases involving horizontal agreements in which the damages awarded are based upon impact on price. The reason for this limitation is that these are the type of multi-defendant cases in which the greatest abuses have occurred and in which individual treble damage responsibility can be calculated in accordance with an easily administered and certain standard -- each defendant's purchases or sales. The most severe abuses would be eradicated with the least litigation costs and complexity. Moreover, S. 1300 would expressly apply only to cases commenced after its enactment -- thus precluding any application to pending litigations. This provision enjoys widespread support within the business community.

---

5. City of Atlanta v. Chattanooga Foundry & Pipeworks, 127 F. 23 (6th Cir. 1903), aff'd, 203 U.S. 390 (1906).

6. Texas Industries Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 646 (1981).

In my opinion, S. 1300 will also enhance the deterrence of antitrust violations. To recover their full treble damages under S. 1300, antitrust plaintiffs will have to join as defendants all those who have assertedly harmed them. And, they will have to collect from each defendant its fair share of the harm caused. Plaintiffs (wishing to be made whole) can no longer "excuse" some defendants by not suing them at all, or by "sweetheart" early settlements, in the knowledge that other defendants can later be forced to pick up the difference. S. 1300 thus makes it more likely that antitrust violators will have to pay a fair share of the treble damages that they cause and thus provides more certain punishment for all. Based upon my experience as an antitrust practioner, I believe that increased certainty of punishment is the most effective way of improving deterrence.

S. 1300 is a long-sought antitrust reform whose time has come. It will restore fairness to the antitrust remedies system and improve deterrence, while still protecting the legitimate interests of plaintiffs. Chairman Thurmond and the other Senators who have sponsored the bill deserve our thanks for helping to forge a fair and effective consensus solution which all responsible parties can enthusiastically support.

Thank you.

WEIL, GOTSHAL & MANGES
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
767 FIFTH AVENUE · NEW YORK, N.Y. 10153

TELEPHONE (212) 310-8000
TELECOPIER (212) 755-3978
(212) 755-0173
CABLE WEGOMA
TELEX ITT 422428
ITT 423144

WASHINGTON OFFICE
1101 FOURTEENTH STREET, N.W.
WASHINGTON, D.C. 20005
(202) 682-7000
TELECOPIER (202) 857-0940
(202) 857-0094
TELEX ITT 440049

FLORIDA OFFICE
800 BRICKELL AVENUE
MIAMI, FLORIDA 33131
(305) 579-8500
TELECOPIER (305) 374-7159

IRA M. MILLSTEIN, P.C.
DIRECT LINE (212) 310-8100

August 14, 1985

Honorable Strom Thurmond
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing in reply to your letters of July 29 and 30 requesting certain additional information concerning S. 1300. The following are my responses to both the question posed by you and Senator DeConcini and to Questions 1, 2 and 4 posed by Senator Metzenbaum. (Question 3 appears to be directed to Judge Bell who will be submitting a separate response.)

1. With respect to your letter of July 29, numerous examples can be cited of antitrust litigations in which the unfair combination of joint and several liability with treble damages forced some defendants to pay more than their fair share of damages. The following are illustrative (I have included examples of both disproportionate settlements and disproportionate judgments to illustrate both sides of the problem):

Corrugated Container Antitrust Litigation, Mem. Op. MDL 310 (S.D. Tex. May 30, 1979). A grand jury investigation of 39 companies for alleged price fixing resulted in 13 corporate indictments. Within the next year, more than 25 class action suits were initiated against the 39 investigated companies, regardless of whether those companies had been indicted. Soon after, International Paper Company, which had pleaded nolo contendere to a felony indictment, settled for $8.3 million, or $1,000,000 per percentage point of its 8.3% share of the affected market.

Compare this to the settlement by Green Bay Packaging, Inc., a small, undiversified, family-owned and managed business. Neither Green Bay nor any of its employees was indicted by the grand jury. While the company was confident that it would be able to prove its innocence, its creditors required it to settle rather than face the threat of joint and several liability for industry-wide treble damages. Green Bay thus had to pay $5,557,500 for its 1.71 percent of the affected market, 3.25 times the rate at which International Paper's settlement was calculated. At a subsequent civil trial, a jury found that Green Bay Packaging was not a participant in the alleged conspiracy.

Consider also the settlement by Menasha Corp., another small, closely-held company in the corrugated container industry. Menasha was forced to pay a settlement of $4,592,250 for its 1.67 percent share of the market, 2.75 times the rate paid by International Paper. Like Green Bay, this company was not indicted by the grand jury, but could not take the risk of being held liable for potential damages of over one billion dollars. It too was found not to be a participant in the alleged conspiracy in a subsequent civil case.

A number of other companies were also forced to settle at disproportionately high and unfair rates in the Corrugated Container litigation. The Continental Group, Inc., for example, was "whipsawed" into settling at 6.5 times the rate of International Paper, despite the fact that the company later was acquitted of the criminal charges against it.

Olson Farms, Inc. v. Safeway Stores, Inc., 649 F.2d 1370 (10th Cir. 1979). In this price fixing suit initiated by fourteen egg producers, the plaintiffs claimed treble damages based upon an alleged conspiracy by five egg purchasers. Of those five companies whose sales were included in the treble damage calculation, the plaintiffs only sued one -- Olson Farms, Inc. -- which had 11.8% of the market. Olson Farms was held liable for the full treble damages, and paid a total of $2,405,500, more than twenty times the plaintiffs' own original estimate of Olson Farms' share of the damages.

Ohio Public Interest Campaign v. Fisher Foods, Inc., 546 F. Supp. 1 (N.D. Ohio 1982). In this price fixing suit against six major food retailers, the Association of Stop-N-Shop Supermarkets settled early for $100,000. However, Fisher Foods, Inc. and First National Supermarkets, Inc. (Pick-N-Pay), whose shares of the market were only slightly larger than that of Stop-N-Shop, were forced to pay a settlement of $20 million in food coupons plus a $3 million fund to cover the cost of the coupons' distribution.

Burlington Industries, Inc. v. Milliken & Co., 690 F.2d 380 (4th Cir. 1982), cert. denied sub nom. Milliken Research Corp. v. Burlington Industries, Inc., 461 U.S. 914 (1983). In this case, Burlington Industries sued Milliken Corporation for damages suffered as a result of an alleged conspiracy between Milliken, Leesona Corp. and others to fix patent royalties on textile equipment. During the damage period, Burlington had paid almost $5 million in royalties to Leesona and $2.7 million to Milliken. Burlington had previously settled a similar case against Leesona for $789,638.

In a judgment for Burlington, the district court held Milliken liable for $20,902,005, almost eight times the amount of royalties Burlington paid Milliken. Finding this amount to be grossly disproportionate to Milliken's participation in the alleged conspiracy, the district court recognized a claim reduction defense for royalties paid by Milliken to Leesona, reducing the judgment against Milliken to $7,462,211. However, the court of appeals held that the claim reduction defense could not be recognized by the courts, leaving Milliken liable for all of Leesona's unpaid treble damages. The damage award against Milliken was remanded on other grounds and ultimately settled for an undisclosed amount.

2. With respect to the first question posed by Senator Metzenbaum, I do not think that there can be any doubt about the existence of the whipsaw problem. The Senate Judiciary Committee has already twice recognized this problem in two separate Congresses in reporting out contribution legislation.[1] Similarly, the Antitrust Law Section of the American Bar Association and the Trade Regulation Committee of the Association of the Bar of the City of New York have come to similar conclusions.[2] As then Assistant Attorney

---

1. See S. Rep. No. 97-359 on S. 995, 97th Cong., 2d Sess. (1982); S. Rep. No. 96-428 on S. 1468, 96th Cong., 1st Sess. (1979).

2. See Report of the Section of Antitrust Law of the American Bar Association (Sept. 1979); Reports of the Committee on Trade Regulation of the Association of the Bar of the City of New York (1980 and 1982).

General William F. Baxter testified before the House Judiciary Committee in 1981, "[w]e have now any number of examples of situations in which a number of asserted co-conspirators of presumably comparable culpability have wound up subject to differing effective damage liability . . . ."[3] I would add to that statement that we also have numerous examples in which companies with arguably the least culpability have been whipsawed into settling for disproportionate amounts (see for example my discussion of the Corrugated Container litigation above, as well as my discussion of the Library Editions of Children's Books cases in my written testimony before the Committee on July 29).

Finally, as to Senator Metzenbaum's question about whether small companies are likely to be unfairly penalized under current law, I would agree with the conclusion of the Staff Report of the House Judiciary Committee that the existing rule of joint and several liability "operates most heavily against those with the smallest market share, who may face potential damages hundreds or thousands of times the benefits they derive, and most lightly against those with the largest market share, who may face potential damages only a few times the benefits they derive."[4]

3. With respect to Question No. 2 posed by Senator Metzenbaum, it is correct that S. 1300 would apply only to agreements between competitors and thus would not apply to "vertical" conspiracies, such as those between a manufacturer and a retailer. If a plaintiff proved a conspiracy involving both manufacturers and retailers, therefore, the bill would not apply. Merely alleging that there was a vertical participant in an agreement between competitors, however, would not be sufficient to remove a case from the bill's coverage. Vertical participation would have to be proven.

The fact that there may be a rare case in which application of S. 1300 could not be finally determined until after trial should not in any way deter settlement discussions. First, most of the cases covered by S. 1300 will unambiguously involve agreements among competitors only so that the issue of vertical participation will not even be raised. Second, even when there are both horizontal and vertical allegations, any uncertainty over the application of S. 1300 would pale in comparison to the general uncertainty in which most settlements are negotiated. Settling parties already take into account any number of factors far more uncertain than the application of S. 1300 (e.g., the probability of success at trial, the consequences of losing or winning, the costs of further proceedings). Indeed, in many instances, it is precisely this uncertainty which leads to, rather than discourages, settlements. S. 1300 would not increase existing levels of uncertainty to any material degree.

4. Finally, with respect to Question No. 4 posed by Senator Metzenbaum, I do not believe that S. 1300 will result in any significant increase in litigation complexity. Although it is true that S. 1300 does not expressly preempt any joint and several liability rules that may exist under state antitrust laws, there are already numerous and far more significant differences between federal antitrust laws and the antitrust laws of the various states, none of which, to my knowledge, have ever been a source of major complexity in the federal courts. If by the question it is being suggested that it would be preferable to have one uniform rule of joint liability for the federal antitrust laws and the antitrust laws of the states, principles of fairness, equity and deterrence would indicate that S. 1300 should provide that rule.

Sincerely,

Ira M. Millstein

---

3. Hearings before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, House of Representatives, pp. 56-57, 97th Cong., 1st and 2d Sess. (1981-82).

4. See Staff Report, Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, House of Representatives, "Proposed Legislation to Allocate Damages Among Defendants in Private Antitrust Litigation," 38 (1983).

The CHAIRMAN. We are very pleased to have you with us. Now who wants to go next? Judge Griffin Bell, the former Attorney General. We are very honored to have you here.

STATEMENT OF GRIFFIN B. BELL

Judge BELL. Mr. Chairman, thank you. My statement has been filed. I will just make a few remarks to supplement what Mr. Millstein said.

This problem has its genesis in 1903, when the sixth circuit imported joint and several liability from the common law into the antitrust law. This was done without analysis; it was affirmed by the Supreme Court under the system that obtained at that time and became part of the antitrust laws.

Class action was little known at that time, and there was no thought given to the large damages that would be generated by trebling. So we have a problem that arises out of three things: class actions, treble damages, and joint and several liability.

This is a problem that has been known to the Senate and to the Congress for a number of years, and we have been through contribution legislation. The Justice Department found a lot of things wrong with that. We have been through claim reduction. The Justice Department found a lot of things wrong with that.

I found a perfect case, I thought, to see if we could not get the law changed in court, it was the *Milliken* case, and the fourth circuit refused to apply common law claim reduction although all the facts, based on equity, would indicate it should be applied, and just remove the share of the market that are settling, the defendants who had paid, that is.

And the reason they said they would not consider it was because this had been the law almost 100 years, and they thought it was up to the Congress to change the law if it was going to be changed.

So we are back now in the Congress, we are back with the same problem, but we have got to, surely, by the most simple solution anyone could come up with, and that is that each defendant would pay that defendant's share of the damages, trebled.

If there is some other defendant who could not be served, who was insolvent, then that share would be apportioned among the other defendants. I cannot imagine anything any fairer, any simpler, or any—contrary to what Mr. Rule said, I think, as to deterrence, and let me give you an example.

Now I have been on a number of these cases as a lawyer. I have been in bid-rigging cases. I was in the *Corrugated Box* case in Houston where one company almost had to pay, who had a very small share and did not do business nationwide, almost had to pay the total damages, which incidentally would have been about twice the net worth of the company, and they were able to settle and get out.

But I have seen cases where the most guilty person would go in and settle first, early on. If, as a lawyer, you know there is a good deal of evidence against your client, it makes sense to go in and settle early.

On the other hand, if there is some poor corporate executive who says we are innocent, we have not done anything wrong, we want to get our rights as Americans to a trial, and they go to trial, and,

in a conspiracy you need only a little evidence to take you to the conspiracy, and you lose.

You have bet your company. You have bet your company, and you may lose your company because you tried to get your right as an American to have a trial.

So you have to balance the deterrence against fairness. If the public is to have confidence in the law in this country, and that is what keeps our country going, is the idea that our law is fair—if we believe that, then we have to do something about this problem, even though the deterrence might not be as great.

But I say that there is more deterrence if you get the more guilty people, do not let them get out cheap and early. That is what the present system is. So, deterrence would be improved. In addition to that, I think it is not a good thing for the Government to be relying so much on the private sector for deterrence in antitrust laws.

If the No. 1 firing position in deterring people from violating the antitrust laws is down on Pennsylvania Avenue at the Department of Justice, that is where the main deterrence comes from.

After that, you get some supplemental deterrence by these private law suits. So it seems to me now, for about 5 years, we have spent most of our time worrying about private deterrence, and what we ought to do is worry more about a fair system while at the same time having deterrence. The system now is not fair.

This bill makes it fair, and it ought to be enacted promptly. If we delay, because we have no studies—there are always going to be studies. If you know antitrust lawyers, you know they spend a lot of their time studying the problems, and writing papers, and that sort of thing.

But you have to have a fair procedure and that is what is lacking, and that is why we ought to have this bill enacted into law. I will be glad to answer any questions about anything that was said by Mr. Rule, or about any of these cases that we have had in the last few years, which all bore on this problem. Thank you, Mr. Chairman.

[Statement and response to Senator Metzenbaum's questions follow:]

PREPARED STATEMENT OF GRIFFIN B. BELL

Mr. Chairman and members of the Committee:

My name is Griffin B. Bell. I am a partner in the law firm of King & Spalding. I have served as a judge of the United States Court of Appeals for the Fifth Circuit, and as Attorney General of the United States under President Jimmy Carter. I am testifying today in support of S. 1300. I am grateful to the Chairman and to the members of the Committee for this opportunity to appear.

I strongly endorse enactment of S. 1300. S. 1300 would improve the administration of our antitrust laws by increasing deterrence and by eliminating serious inequities in private treble damage actions. The bill would achieve these goals by modifying the doctrine of joint and several liability in certain private treble damage actions alleging anticompetitive agreements among competitors. At the same time S. 1300 would protect the right of injured plaintiffs to receive full treble damages. This bill represents a long-sought solution to well-recognized problems of antitrust damage allocation.

The doctrine of joint and several liability was incorporated into federal antitrust law by judicial interpretation, without analysis, in 1903.[1/] Application of this doctrine gives antitrust plaintiffs unlimited discretion to allocate responsibility for treble damages among defendants. Any specific defendant can be compelled to pay all or nothing, regardless of its relative culpability or the benefits (if any) that it derived from the violation. In short, joint liability

---

1/ Atlanta v. Chattanooga Foundry & Pipeworks, 127 F. 23 (6th Cir. 1903), aff'd, 203 U.S. 390 (1906).

is not a rule of damage allocation but a decision that antitrust damages will be allocated in the interests of plaintiffs rather than in the interests of justice.

The problems created by joint liability have been identified in previous hearings before this Committee. They require no lengthy discussion since they are by now familiar to all those concerned with effective antitrust law enforcement. They have been described in various ways: Some have emphasized that current law permits plaintiffs to whipsaw defendants by threatening each with the total treble damage liability arising from an entire conspiracy. Because this amount can run into billions of dollars, this tactic can force each defendant to pay substantial settlements even when culpability is speculative.

Others point out that joint liability prevents the punishment for antitrust violations from fitting the crime: Those who originate and perpetuate illegal conspiracies can profit from their behavior and then escape serious liability by settling out early for a small amount with any plaintiff who discovers their wrong-doing. The unsophisticated and the unwary are left to pay the bulk of the damages.

It has also been explained how a company faced with multi-billion dollar liability for alleged participation in an antitrust conspiracy can be prevented from obtaining vindication by going to trial. No prudent management can risk financial ruin by gambling on a favorable jury verdict, even where the evidence of liability is slight. The impact of a ruinous damage award is a threat not only to the victimized firm, but also to its stockholders, employees, customers and the communities who rely upon it as a going business.

All these complaints have a common origin: They are all attributable to joint liability, which allows plaintiffs to

assign treble damages arbitrarily and in accordance with their own narrow purposes -- regardless of the degree of culpability, regardless of the relative benefit each defendant may have derived, and regardless of the ultimate purpose of the antitrust laws of bringing price-fixers to justice.

Congress has explored a variety of solutions to these problems. In the 96th Congress Senator Bayh introduced S. 1468 to create rights of contribution in antitrust cases.[2/] In the 97th Congress, Chairman Thurmond -- the chief sponsor of S. 1300 -- introduced S. 995, a proposal aimed at these same problems.[3/] Still another proposal was introduced in the House during the 98th Congress.[4/] Due in large measure to the leadership and concern demonstrated by this Committee, the Congress, the Antitrust Bar, and the Administration have been thoroughly familiarized with the problems addressed by S. 1300. What has eluded the Congress thus far is consensus on a solution. I believe that S. 1300 can succeed in producing this consensus.

For three basic reasons S. 1300 offers a unique opportunity to resolve the difficult questions created by the complete failure of existing law to allocate treble damage liability. For the first time the legal environment allows clear and dispassionate assessment of the issues. Consideration of earlier proposals was clouded by major antitrust litigation that was still pending before various federal courts. Together, those lawsuits involved billions of dollars in potential liability. Defendants and plaintiffs involved in those lawsuits lobbied intensively for the version of the legislation

---

2/ 96th Cong., 1st Sess., 125 Cong. Rec. 17618-19 (1979).

3/ 97th Cong., 1st Sess., 127 Cong. Rec. 3897-98 (1981). See S. Rep. No. 97-359, 97th Cong., 2d Sess.

4/ H.R. 2244, 98th Cong., 1st Sess., 129 Cong. Rec. 1549-50 (1983).

that they believed would most favor their litigation tactics if enacted. In that atmosphere it became difficult to separate the public policy debate from the short-run litigation strategies of the parties involved.

All of those lawsuits have been concluded.[5/] The proponents of S. 1300 are drawn from both sides of the previous lobbying battle. The bitter disagreements that made earlier Congressional action impossible have vanished. There can be no clearer demonstration of this fact than the presence of Ira Millstein as the co-captain of the group of leading supporters for S. 1300. He and I were opponents in the earlier debate, but are now united in our efforts in behalf of this bill.

Second, the Congress, the Bar, the Executive Branch, and others concerned with these issues are much farther down the learning curve now than they were during consideration of earlier proposals. The issues have been thoroughly aired and the relative merits of the various approaches have been debated and assessed. The weaknesses of earlier approaches are now better recognized and the characteristics of an acceptable solution are better defined. The need for an approach like S. 1300 -- simple, direct, and aimed at the heart of the problem -- is now fully appreciated.

Finally, S. 1300 represents a clear improvement over earlier proposals affecting antitrust damage allocation. It is the only proposal that goes directly to the source of the major problems in this area. It does so without complexity or uncer-

---

5/ Among those cases regarded as a source of controversy were Plywood, Fine Paper and Corrugated. Plywood was settled pending certiorari before the Supreme Court. Weyerhaeuser Co. v. Lyman Lamb Co., 655 F.2d 627 (5th Cir. 1981), cert. dismissed, 462 U.S. 1165 (1983). Fine Paper was settled on the eve of trial by one group of plaintiffs, and litigated to judgment by the remaining plaintiffs. Certiorari was denied in Alaska v. Boise Cascade, 459 U.S. 1156 (1983). Corrugated was settled. See 1983-2 Trade Cas. ¶ 65,628 (S.D. Tex. 1983).

tainty, without creating new claims, issues, or procedures, and without adding to the workload of the Judiciary. S. 1300 will enhance antitrust deterrence by preventing sweetheart deals between plaintiffs and the defendants who profit most from illegal conspiracies. It will discourage meritless lawsuits because it will prevent plaintiffs from extorting settlements in excess of amounts that reflect a sober assessment of liability and a realistic allocation of damages. It will give innocent companies the opportunity to be vindicated at trial rather than forcing them to capitulate in settlement. It will still permit plaintiffs to be compensated fully for the injuries they suffer as a result of illegal antitrust conspiracies.

In sum, enactment of S. 1300 is wise public policy. This proposal comes at a time when the desirability of reform is unobscured by partisanship or the contentions of special interests. It enjoys widespread support and it deserves prompt and favorable consideration by this Committee.

I want to close by thanking the Chairman and the other sponsors of this bill for their leadership in the search for a sound solution to the problems of antitrust law enforcement and treble damage allocation. I believe you have finally found such a solution in S. 1300. I appreciate the opportunity to appear before you today.

KING & SPALDING
1730 PENNSYLVANIA AVENUE, N. W.
WASHINGTON, D. C. 20006-4706
202/737-0500
TELECOPIER 202/737-5714
2500 TRUST COMPANY TOWER
ATLANTA, GEORGIA 30303
404/572-4600

August 20, 1985

Honorable Strom Thurmond
Chairman, Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

In response to Senator Metzenbaum's questions which you forwarded to me on July 30, 1985, my answer to Question 3 follows. For convenience, Ira Millstein's July 14 letter which responds to Questions 1, 2, and 4 is attached.

In response to Question 3, class actions were created in order to facilitate adjudication of common claims held by parties too numerous to be joined in a single action. See Wright & Miller, Federal Practice and Procedure §1751. Where numerous purchasers have been injured by a price-fixing conspiracy, the class action permits those whose claims would otherwise be too small to justify litigation to recover for their injuries. Thus, it is typical for numerous members of a plaintiff class to claim and to recover relatively small amounts. Plaintiffs' lawyers, by contrast, often win multimillion dollar fees for litigating these class actions. These fees ordinarily will far exceed the recoveries ultimately won by individual class plaintiffs.

In the Fine Paper case, for example, the plaintiff class consisted of all purchasers of fine paper nationwide. In re Fine Paper Antitrust Litigation, 751 F.2d 562, 568 n.2 (3d Cir. 1984). The plaintiffs' attorneys sought a total of $21 million in fees. "Thus, in the aggregate, attorneys for the class sought over 40% of the $50,650,000 settlement fund." 751 F.2d at 570-71. While final fee determinations have not yet been made, it is conceivable that the lawyers will obtain almost as much from the litigation as plaintiffs in the aggregate. In any event, the attorneys' recovery is highly likely to exceed any individual plaintiff's recovery by a wide margin.

While I am aware of no comprehensive empirical study of similar cases, I am not aware of any serious dispute that this pattern is not only typical of nationwide class action price-fixing cases, but is unavoidable in view of the purposes of the class action. While the class action is an appropriate means to redress the consequences of antitrust violations, the whipsaw tactics recently employed by plaintiffs' attorneys in these actions are not needed for that purpose and should be done away with, as they would be by S.1300.

With respect to the second part of this question, it is apparent that whipsaw tactics are effective because a firm can be threatened with bankruptcy, not because plaintiffs' attorneys make a frequent practice of actually forcing firms into bankruptcy. Thus, while it is a relatively rare experience for an antitrust judgment to force a firm into bankruptcy, defendants in nationwide class actions are typically subject to liabilities far in excess of their net worth. This is precisely why most prudent companies choose to settle litigation in the face of such threats, rather than litigate their innocence. S.1300 would preclude the use of such unwarranted threats unless the victimized firm had indeed created liabilities of that magnitude through its own misconduct.

Please contact me if I can provide further information. With kindest regards and best wishes,

Sincerely yours,

Griffin B. Bell

The CHAIRMAN. Thank you, Judge.

Mr. Polinsky, the Josephine Scott Crocker professor of law and economics, Stanford University School of Law. We are very pleased to have you with us.

STATEMENT OF A. MITCHELL POLINSKY

Dr. POLINSKY. Thank you, Mr. Chairman, and members of the committee. I am very pleased to be here this morning to testify about S. 1300.

I am here speaking as an academic economist who specializes in the economic analysis of legal rules and institutions, and one of my areas of expertise is the economic theory of deterrence, and the proper calculation of damages.

My written testimony is fairly long and I would like to have it included in the record. Since it has been filed, I will simply summarize the main points and conclusions that I came to in light of my analysis of S. 1300.

There are four criteria that economists typically use to evaluate legal rules. The first one is the deterrence of misconduct. The second one is the desire to avoid unnecessary risk on defendants.

The third one is the compensation of victims, and the fourth one is the desire to reduce litigation costs in society. I would like to go through briefly and summarize my conclusions with respect to each of these considerations.

With respect to the first point, the deterrence of misconduct, for reasons explained in my written testimony, I believe that the proper deterrence of antitrust violations will occur if each individual antitrust violator is made liable for the treble damages attributable to that violator.

This of course is exactly what S. 1300 promotes, and therefore, S. 1300 will promote proper deterrence. In contrast, under joint and several liability, some violators, those who anticipate having to pay less than their proportionate share of liability will be underdeterred.

Other violators, or defendants who may not be violators, who anticipate being gone after for a disproportionally large share of treble damages will be overdeterred, and by overdeterrence, I mean that they will be deterred from engaging in potentially socially beneficial conduct that might be confused with an antitrust violation.

So I conclude with respect to the deterrence consideration, that S. 1300 is superior to joint and several liability.

The second consideration is the desire to avoid imposing unnecessary risks on defendants. I think it is obvious that risk is bad. Individuals and corporations buy insurance, are willing to spend a great deal of money to buy insurance to prevent risk, and it is economically and socially desirable to avoid risk when possible.

S. 1300 limits the risk imposed on defendants to treble the damages caused by that defendant. In contrast, under joint and several liability, a defendant can be liable for as much as, as many people have already mentioned, up to treble the entire industry's damages, and therefore, imposes a much greater risk on defendants than does S. 1300.

I therefore feel that S. 1300 is superior to joint and several liability in terms of the allocation of risk.

The third criterion is the compensation of victims, and with respect to that consideration, those plaintiffs who go to trial and prevail will receive exactly the same amount under S. 1300 as under joint and several liability. They will receive treble their damages.

If they settle out of court, I would predict that they will receive a lower settlement amount under S. 1300 because they do not have the threat of the so-called "whipsaw" effect to bring against the defendant.

However, this is not to imply that compensation will be inadequate under S. 1300. Since they will get treble damages if they prevail at trial, as long as they have at least a one in three chance of prevailing at trial, the expected settlement amount would be at least as large as their actual losses, and therefore they would be fully compensated in such circumstances under S. 1300.

Finally, I would like to briefly mention consideration of reducing total litigation costs. S. 1300 will have two effects on the cost of litigation. On the one hand, it will lead to fewer suits being initiated. The suits that, under the current rule, have the lowest probability of prevailing will be the ones not brought under S. 1300.

This will tend to reduce the total cost of litigation in society. On the other hand, S. 1300 will probably lead to a greater likelihood of trial rather than settlement, and this will tend to increase litigation cost. Since I believe most cases are going to be settled under either rule because of the strong motivations for settlement in general, I do not think the second effect will be as important as the first effect. Therefore, my beliefs are that S. 1300 will probably reduce litigation costs. But in any case, even if I am wrong, I do not think that the potential increase would be significant.

I therefore conclude, in light of this analysis of these four considerations, that S. 1300 would be an improvement over joint and several liability, principally because it promotes better deterrence and it does so without imposing unnecessary risk. Thank you.

[Statement and response to written questions of Senator Thurmond follow:]

PREPARED STATEMENT OF A. MITCHELL POLINSKY

My name is A. Mitchell Polinsky. I am the Josephine Scott Crocker Professor of Law and Economics at Stanford University. I teach both in the School of Law and in the Department of Economics there. My professional training is as an economist. I hold an A.B. in economics from Harvard University and a Ph.D. in economics from the Massachusetts Institute of Technology. I have also studied law at Yale Law School, where I obtained a Master of Studies in Law degree. The focus of my writing and research is the application of economic analysis to legal problems. I have written a textbook titled An Introduction to Law and Economics, which has been adopted by over fifty law schools and economics departments. I have also written numerous research papers that deal with the economic analysis of law. Several of these articles are concerned with the deterrence of misconduct and with the proper calculation of damages. (An attachment to my testimony lists the articles that address these issues.)

I am testifying today about Senate Bill S. 1300, which, as you know, would modify the current rule of joint and several liability for antitrust defendants. Under the current rule, the plaintiff may obtain a treble damage judgment against the entire industry from any one defendant or may arbitrarily apportion the judgment among many defendants. S. 1300, in contrast, provides that each antitrust violator pay treble the damages that he caused, and only that. Although S. 1300 contains two exceptions to this principle, I will defer my discussion of these exceptions until the end of my testimony.

The views expressed today are based on research undertaken jointly with Steven Shavell, Professor of Law and Economics at Harvard University. In a 1981 article we analyzed different methods of allocating liability among multiple antitrust defendants, but did not consider the method embodied in S. 1300

(see A. Mitchell Polinsky and Steven Shavell, "Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis," Stanford Law Review, Vol. 33, No. 3 (February 1981), pp. 447-471). In our current research we have extended this analysis to include a comparison of S. 1300 to joint and several liability. (This research was supported by the Coalition for Antitrust Remedies Reform, an ad hoc group of business interests endorsing S. 1300.)

I would now like to briefly summarize the conclusions that I have reached regarding S. 1300. After that, I will explain in some detail the basis for these conclusions.

Summary of Conclusions

Economists usually evaulate legal rules in terms of four criteria: deterrence of misconduct, avoiding imposition of excessively large financial risks on defendants, compensation of victims, and reduction of the cost of litigation.

- **Deterrence of misconduct is improved by S. 1300 because an antitrust violator's liability better corresponds to the harm he causes. In contrast, under joint and several liability, a potential violator might expect to pay more or less than the harm he causes, and therefore would not be properly deterred.**

- **Avoidance of excessive financial risk is accomplished under S. 1300 because liability is limited to treble the harm caused by a violator. Under joint and several liability, however, an individual defendant's liability can far exceed this amount--and may be as high as industry-wide trebled harm. The imposition of such large risks under joint and several liability is socially undesirable.**

- **Compensation of victims of antitrust violations is the same under S. 1300 as under joint and several liability when cases are tried in court. When cases are settled out of court, the amount received in**

settlement under S. 1300 is likely to be less than under joint and several liability; however, it should still be enough to fully compensate victims for their losses if they have at least a one in three chance of prevailing were they to go to trial.

- The cost of litigation could be lower or higher under S. 1300, although there is a reason to believe that it will be lower. Some suits that would have been initiated under joint and several liability will not be brought under S. 1300 (the ones with the lowest probability of prevailing); this will tend to reduce litigation costs. But the likelihood that a suit will be tried rather than settled probably will be greater under S. 1300, which will tend to raise litigation costs. However, the savings in litigation costs under S. 1300 due to fewer suits may be the more important effect because most suits will probably be settled under either rule.

In sum, I believe that S. 1300 is likely to fully compensate victims for their losses (assuming they have at least a one in three chance of prevailing at trial). I also believe that S. 1300 may well reduce litigation costs, but even if it raises litigation costs, the increase is not likely to be substantial. I therefore recommend S. 1300 over joint and several liability principally because S. 1300 will result in more appropriate deterrence of misconduct and will not impose socially undesirable financial risks on defendants.

I would now like to provide the reasons for the conclusions just summarized.

Deterring Misconduct

Before addressing the subject of deterrence in the area of antitrust, I need to explain briefly the economic theory of deterrence in a more general context. In order to properly deter bad conduct, it is necessary to make an injurer pay for the harm

he causes. Clearly, if an injurer does not have to pay for the full harm he causes, he will not be adequately deterred. However, if an injurer has to pay for more than the harm he causes, he may be discouraged from engaging in socially desirable activities. By making injurers pay for exactly the harm they cause--not less and not more--both problems are avoided.

This point needs to be qualified when there is a chance that an injurer can escape liability. An injurer might not be found liable, for example, because he is able to conceal his misconduct or because of the difficulty of proving his misconduct at trial. If an injurer can possibly escape liability, then in order to create appropriate deterrence, it is necessary to increase the amount the injurer has to pay when he is found liable. For example, if there is only a one in three chance that an injurer will have to pay for the harm he caused, then, if he is successfully sued, it is necessary to make him pay treble the harm caused.

These principles have a direct application in the area of antitrust law. If each antitrust violator were certain to be found liable for his misconduct, proper deterrence would be achieved by making him pay for exactly the harm he caused. However, it seems clear that antitrust violators will not always be discovered or be successfully sued. It is therefore appropriate that they should have to pay some multiple of the harm they caused when they are found liable. In my discussion today I will assume that the Congressionally chosen multiplier of three is correct. Thus, proper deterrence will be achieved by making individual antitrust violators pay treble the damages that they caused.

Although it should be clear that a lower level of liability than this would lead to inadequate deterrence, it may not be as obvious why a higher level of liability would be undesirable. Making a firm pay more than is necessary to achieve proper deterrence may cause it to avoid socially beneficial conduct.

For example, because of the prospect that parallel, but independent, behavior might be found to be a conspiracy, firms may be led to employ inefficient pricing and marketing practices.

By design, S. 1300 will accomplish proper deterrence. This is simply because, under this bill, each violator is responsible for exactly treble the harm he causes.

Under joint and several liability, deterrence is likely to be improper. There are two reasons for this conclusion. First, the plaintiff generally will not choose to collect from each defendant an amount equal to treble the damages that that defendant caused. For example, a defendant whose assets are easily attachable might expect to pay a disproportionately large share of joint damages. Or a defendant in a continuing business relationship with the plaintiff might expect to pay a disproportionately small share of joint damages, maybe nothing at all. Because of these kinds of considerations, individual defendants often will not pay treble the damages that they caused.

The other reason deterrence may be improper under joint and several liability has to do with the settlement process. Under joint and several liability, a defendant who does not settle may have to pay damages far in excess of treble the harm he caused--possibly as much as trebled industry-wide damages. Therefore, some defendants may be willing to settle for an amount greater than treble the harm they caused, resulting in improper deterrence. (Improper deterrence may also arise under joint and several liability because some defendants may be able to settle for too low an amount.)

Avoiding Imposition of Excessive Risks on Injurers

The possibility that a corporation would have to pay an extremely large judgment for a violation, one in excess of what is needed to create adequate deterrence, is economically undesirable. This is because payments of large dollar amounts can cause major disruptions to a corporation's activities and, in

the extreme, force it into bankruptcy. Such payments adversely affect individuals who depend on the corporation's stability--employees and stockholders and possibly the community in which the corporation is located.

Under S. 1300, a corporation would never have to pay an amount greater than that needed to create adequate deterrence. Of course, this is because S. 1300 limits a corporation's liability to treble the harm it caused.

Under joint and several liability, however, a corporation's liability can, as I have emphasized, exceed treble the harm caused. Joint and several liability therefore imposes unnecessary, and undesirable, risks on corporations.

Compensating Victims

The compensation of victims of antitrust violations is socially desirable. This is because such compensation lessens the economic dislocations that would otherwise occur. For example, when the victim of the antitrust violation is a corporation, compensation reduces the variability of profits. The fact that, in general, individuals and corporations frequently buy insurance to protect themselves against large financial losses is suggestive of the value they place on reducing risk. Since individuals and corporations cannot buy insurance against the risk of being a victim of an antitrust violation, using the antitrust laws to compensate them is a desirable substitute.

Under both S. 1300 and joint and several liability, an antitrust victim who sues and wins at trial will receive treble his losses. Thus, when cases are successfully tried, the victim will receive the same amount under the two rules, and more than enough to compensate him for his losses.

When an antitrust victim settles out of court, the amount that he is likely to receive will be different under S. 1300 from that under joint and several liability. Let me explain why. Under joint and several liability, an antitrust defendant could

be liable at trial for as much as the entire industry's trebled damages. Under S. 1300, in contrast, a defendant's liability at trial is limited to treble the damages that he alone caused. Thus, defendants are likely to pay more in settlement under joint and several liability than under S. 1300.

If the amount that antitrust victims receive in settlement under S. 1300 is not enough to compensate them for their losses, then the extra amount received under joint and several liability might be desirable. However, because victims would receive treble their losses under S. 1300 were they to prevail at trial, they can expect to obtain a settlement at least equal to their losses if they have at least a one in three chance of winning at trial. Such victims would therefore be fully compensated under S. 1300.

Reducing Litigation Costs

The cost of litigation depends both on the number of suits that are initiated and on the fraction that are then tried rather than settled. Obviously, the more suits that are brought, everything else equal, the higher the cost of litigation. Also, since suits are more expensive to try than to settle, the higher the fraction of suits that are tried, the higher the cost of litigation.

The number of suits initiated probably will be less under S. 1300 than under joint and several liability. The reason for this conclusion is based on some prior observations. As noted, if cases are settled, the settlement amount is likely to be higher under joint and several liability because of the greater pressure to settle. If cases are litigated, plaintiffs will obtain the same award under both S. 1300 and joint and several liability. Thus, a potential plaintiff would expect to obtain at least as much in payment under joint and several liability as under S. 1300. He would therefore be more likely to initiate a suit under joint and several liability. (Note that the suits that will not be brought under S. 1300 that would have been brought under joint

and several liability are those with the lowest probability of prevailing.)

Of those suits initiated, a smaller fraction probably will be settled under S. 1300 than under joint and several liability. Again, this is because of the greater pressure to settle under joint and several liability.

On balance, therefore, taking into account both the number of suits brought and the fraction that are settled, it is not possible to say with certainty whether the cost of litigation will be lower or higher under S. 1300. However, there is a reason to believe that litigation costs may be lower under S. 1300. Even under S. 1300, most suits probably will be settled because of the resulting savings to the parties of their trial costs and because of their desire to avoid the uncertainty of the trial outcome. Thus, the additional pressure to settle under joint and several liability may not lead to a substantially higher fraction of suits that are settled. If so, then the savings in litigation costs under S. 1300 due to fewer suits may be the more important effect.

The Two Exceptions in S. 1300

There are two exceptions to the principle embodied in S. 1300 that antitrust defendants should be liable only for treble the damages they caused. Both exceptions arise when plaintiffs would not otherwise be able to recover fully the trebled damages of the industry. The first exception applies when some violator is beyond the jurisdiction of the Federal courts. The second exception applies when some violator is financially incapable of satisfying the judgment against him. Under either exception, the remaining defendants are made to bear, in addition to their own liability, that portion of the judgment that plaintiffs would otherwise be unable to collect.

I would now like to consider briefly the effects of these exceptions in terms of the four criteria for evaluating legal rules.

The deterrence of misconduct is not likely to be improved by these exceptions. The reason is simply that the exceptions make a defendant pay more than treble the losses that he caused. However, even with the exceptions, the defendant's liability under S. 1300 would be less than what he could be made to pay under joint and several liability. Therefore, the problem with deterrence created by the exceptions in S. 1300 is likely to be less serious than the problems with deterrence under joint and several liability that I discussed earlier.

The exceptions in S. 1300 also introduce the risk that an antitrust violator will have to pay an amount in excess of what is necessary for adequate deterrence. Again, this is because the exceptions make a defendant pay more than treble the losses he caused. But, also again, the problem with the exceptions is less serious than that created by joint and several liability.

The compensation of victims will be greater as a result of the exceptions in S. 1300. This is because the exceptions apply when victims would not otherwise be able to collect from all violators. If victims would not be fully compensated for their losses in the absence of the exceptions, the additional amount they receive due to the exceptions may be desirable. However, since damages are trebled, it is quite possible that victims would be able to obtain full compensation for their losses even when they cannot collect from all violators.

The costs of litigation may rise or fall as a result of the exceptions in S. 1300. Since the exceptions increase the amount that plaintiffs can expect to obtain from defendants, the exceptions will be likely to increase the number of suits initiated. On the other hand, because the exceptions create an additional pressure to settle analogous to that under joint and several liability, the exceptions make settlement more probable. Thus, the net effect of the exceptions could be to increase or decrease the cost of litigation. However, if, as I suggested earlier, the number of suits initiated is likely to be of greater

importance than the fraction of suits that are settled, then the exceptions will increase litigation costs, at least somewhat.

This review of the four criteria shows that the exceptions in S. 1300 will be desirable only if the possible improvement the exceptions make with respect to the compensation of victims outweighs their likely disadvantages with respect to the deterrence of misconduct, the risks imposed on defendants, and the costs of litigation. Whether the exceptions are desirable or not, their impact on the overall desirability of S. 1300 is probably small since the exceptions presumably would apply in relatively few cases.

Recommendation

I have suggested today that S. 1300 will be more likely than joint and several liability to result in appropriate deterrence of misconduct in the area of antitrust. Also, S. 1300 will be less likely to impose unnecessary, and socially undesirable, financial risks on antitrust defendants. While it is more difficult to determine whether S. 1300 will have desirable effects on the compensation of victims and on the cost of litigation, I have suggested some reasons why S. 1300 may be desirable with respect to these considerations too. For these reasons, I believe that victims are likely to be fully compensated for their losses under S. 1300. I also believe that S. 1300 may well reduce litigation costs, and that, if it nonetheless raises them, the increase is not likely to be significant. Consequently, I favor S. 1300 over joint and several liability principally because S. 1300 will better deter misconduct and will do so without imposing excessive financial risks on defendants.

Attachment

I have written the following articles, using economic analysis, about the deterrence of misconduct and the proper calculation of damages. They are listed in chronological order.

"Controlling Externalities and Protecting Entitlements: Property Right, Liability Rule, and Tax-Subsidy Approaches," Journal of Legal Studies, Vol. 8, No. 1 (January 1979), pp. 1-48.

"The Optimal Tradeoff Between the Probability and Magnitude of Fines" (with Steven Shavell), American Economic Review, Vol. 69, No. 5 (December 1979), pp. 880-891.

"Private Versus Public Enforcement of Fines," Journal of Legal Studies, Vol. 9, No. 1 (January 1980), pp. 105-127.

"On the Choice Between Property Rules and Liability Rules," Economic Inquiry, Vol. 18, No. 2 (April 1980), pp. 233-246.

"Strict Liability vs. Negligence in a Market Setting," American Economic Review: Papers and Proceedings, Vol. 70, No. 2 (May 1980), pp. 363-367.

"Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies," Stanford Law Review, Vol. 32, No. 6 (July 1980), pp. 1075-1112.

"Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis" (with Steven Shavell), Stanford Law Review, Vol. 33, No. 3 (February 1981), pp. 447-471.

"Risk Sharing through Breach of Contract Remedies," Journal of Legal Studies, Vol. 12, No. 2 (June 1983), pp. 427-444.

"Products Liability, Consumer Misperceptions, and Market Power" (with William P. Rogerson), Bell Journal of Economics, Vol. 14, No. 2 (Autumn 1983), pp. 581-589.

"The Optimal Use of Fines and Imprisonment" (with Steven Shavell), Journal of Public Economics, Vol. 24 (1984), pp. 89-99.

"Optimal Liability When the Injurer's Information is Imperfect," preliminary draft, March 1984.

"The Welfare Implications of Costly Litigation in the Theory of Liability" (with Daniel L. Rubinfeld), preliminary draft, forthcoming August 1985.

STANFORD LAW SCHOOL

August 13, 1985

Senator Strom Thurmond, Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Thurmond:

Thank you for your letter of July 30, 1985. I am writing at this time to respond to the questions Senator Metzenbaum addressed to the panel that I participated on at the hearings on S. 1300. Because I am an economist and Judge Bell and Mr. Millstein are lawyers, I will defer to them in answering the more technical legal questions that you raised. Accordingly, I will limit my response to the first question.

There are two aspects to my response. The first relates to whether there is hard empirical evidence that the whipsaw effect actually occurs in practice. I have not personally undertaken empirical research on this issue, and do not know of anyone who has. Therefore, to my knowledge, the answer to this question can only be derived from practical experience in the antitrust area. Judge Bell and Mr. Millstein will, I trust, provide their insights on this matter.

The second aspect of my response to Senator Metzenbaum's first question concerns whether my analysis of S. 1300 depends on the existence of a whipsaw effect. Although there are strong theoretical reasons to believe that a whipsaw effect would occur under joint and several liability, my major conclusions about the desirability of S. 1300 relative to joint and several liability do not depend on this effect. The main reasons I preferred S. 1300 were that it created more appropriate deterrence (because it allocated liability according to the harm caused) and that it did not impose unnecessary risks on defendants. Even if out-of-court settlements were not a possibility--thereby eliminating by assumption the possibility of the whipsaw effect--S. 1300 would still be preferable to joint and several liability for these same reasons. Thus, while the whipsaw effect under joint and several liability makes the case for S. 1300 stronger, the arguments I find most compelling for S. 1300 still would apply in its absence.

I hope that these comments are sufficiently responsive to Senator Metzenbaum's question.

Sincerely,

A. Mitchell Polinsky

The CHAIRMAN. Thank you very much. Judge Bell, would you regard the way that plaintiffs allocate damage responsibility among co-defendants as a part of the plaintiffs role as private attorneys general?

Judge BELL. I do not. I think that while they have the power, it is subject to abuse because it can be arbitrarily done, and it has been done arbitrarily in the past. I think that is not a proper role for the government to delegate to the plaintiff's lawyers.

The CHAIRMAN. Judge, in your view, under S. 1300, will it be difficult for plaintiffs to identify all of the coconspirators who have caused them antitrust injury?

Judge BELL. No more so than now. They do that now, and everything would be exactly as it is now, except you would give up your share of the damages when you took a cheap settlement with the most guilty person. Let me say this: The plaintiffs would deny they would do that. They would say that they are looking for somebody to finance their case and they want everybody to come in that will.

But human nature says that the ones that come in usually are the ones that are more worried.

The CHAIRMAN. Judge, in your view as a former Attorney General, will deterrence be reduced if antitrust violators face lower potential liability for their actions without joint liability?

Judge BELL. Well, that is a difficult question to answer. Their damages for just a market share are so high, that it seems to me that that would be deterrence enough. It is hard for anybody to visualize that you are going to have to pay for the whole Nation, the whole industry, for the Nation, and no one would ever have thought of that until within the last 5 years. That is such a deterrent that it is like the death penalty. I mean, you are going out of business if you have to pay that.

So, you could argue that that is a greater deterrent than just paying your market share, but my argument would be that the market share alone is sufficient, to be a reasonable deterrent, anything that the law would normally require.

The CHAIRMAN. Thank you, Judge Bell. Mr. Millstein, in your statement you suggested that the "whipsaw" settlement effect of joint and several liability reallocates liability without regard to culpability.

In your view, do plaintiffs tend to reach settlement terms corresponding to culpability, exacting more from those against whom the evidence is strongest?

Mr. MILLSTEIN. No. I agree with Judge Bell. I think the plaintiffs would say that they tried to do that, but in the cases I have been involved in—and I have been involved in many of them—the first defendant through the door gets the best settlement, and the defendant who is most likely to be the first one through the door is the well-financed, well-represented, worried defendant, and that has very little to do with anything other than culpability. And so sometimes, one might argue, that the most culpable are the most likely to take the first cheap settlement.

The CHAIRMAN. Now Mr. Millstein, the bill as drafted and introduced applies only to agreements among competitors that have an effect on prices, and Mr. Kohn's written statement suggests that this class of cases contains the worst antitrust violations.

Can you respond to that suggestion and tell us why this bill should apply only to agreements that affect prices?

Mr. MILLSTEIN. Because the bill was drafted with the thought in mind that it should be simple to administer. One of the criticisms which was leveled at the contribution and claim reduction bill was that it would lead to additional litigation, people would be suing one another, and there would be all kinds of problems in the court.

This time around the thought was to draft a bill that is self-executing. This bill is self-executing. You pay damages only on your share of the sales or purchases, and that can only be done in a case where the sales or purchases are the key to the violation, and damages are related to price. So where you have sales or purchases and a price effect, you automatically relate the damages just to those sales or purchases and the price effect by each defendant. It is easy to do; you do not have to have additional litigation; you do not have to have a big court hearing on it.

If you expand any further than that, you are going to have an enormously complex problem as to how to allocate damages, and as I said at the opening, Senator, it seems to me that you would not want to stretch this bill to cover such complicated cases where there are no documented abuses.

It happens to be that horizontal price-fixing cases is where we found, and you heard about, the abusive "whipsaw" tactics. So I believe the bill is drafted to get just at these abuses and the serendipity is that there is an easy way to draft the solution. Everything else gets too complex and I would not want to stretch it beyond that. Why include things that are not a problem?

The CHAIRMAN. Mr. Millstein, could you describe in more detail the consensus of approval for this bill in the business community among large and small companies, and among plaintiff companies and defendant companies.

Mr. MILLSTEIN. Well, Judge Bell and I spent months going around and visiting different business groups to explain this bill. I do not know how many meetings we have had with how many different lawyers and business people, but they included: the Chamber; the NAM; the Roundtable; numerous companies; attorneys and businessmen. We have yet to find anyone who objects to it.

Indeed, we were authorized to represent to you and this committee that this bill represents a deep and almost, I know of no dissent, unanimous consensus of the business community.

Moreover, I believe, although it is not official as yet, and a draft report is being prepared, I believe that the Antitrust Law Section of the American Bar Association is in favor of this bill, and will, within the month, submit its views to you after it works them through the various levels of the bar association, which takes some time.

Now, other than what you have heard here today, I do not know where the opposition comes from. It seems to me that this is a consensus bill.

The CHAIRMAN. Now the business community are the ones that are generally sued, are they not?

Mr. MILLSTEIN. They are the ones who are generally sued, but these days, Senator, the business community is also frequently among the plaintiff class. I just finished representing a group of

fourteen large companies who are in the plaintiff's class, in the *Fine Paper* case, and who collected a great deal of money as a result of being included in that class.

So, today, especially with class actions, big, small, and medium-sized companies are plaintiffs and defendants.

Judge BELL. Well, let me add, in the *Corrugated Box* case in Houston, the largest recovery made by a plaintiff was Procter & Gamble, and some other companies of that size.

They were all in the plaintiff class. They were buying boxes.

The CHAIRMAN. So the business community are plaintiffs, too. Some people have the idea that plaintiffs are generally individuals and they are against the business people.

Mr. MILLSTEIN. I think that is right, Senator, and I think that the people who looked at this looked at it from both sides, and determined that before they would come back to this committee and make any suggestion at all, they would be sure that the business community was uniformly, plaintiff and defendant companies, in favor of it.

The CHAIRMAN. Thank you very much. Professor Polinsky, I am interested in the effects of S. 1300 on deterrence. You indicate in your statement that settlement amounts might be lower under S. 1300 than under joint and several liability. Does the prospect of being able to settle out of a suit for less under S. 1300 lower the deterrent effect on a potential antitrust violator?

Dr. POLINSKY. Mr. Chairman, the answer is yes with respect to that consideration alone. Everything else equal, obtaining a lower settlement amount will tend to lessen deterrence, but there are offsetting considerations that Mr. Rule did not mention this morning. One is developed in an article that I wrote with Professor Steven Shavell of Harvard University in 1981 in the Stanford Law Review, which develops the viewpoint that by spreading liability amount multiple defendants there may be a greater deterrent effect than having liability concentrated, at random, on one defendant.

So, when one takes account of multiple considerations, I do not think one can conclude, as Mr. Rule did this morning, that it is necessarily true that moving to S. 1300 will lower the total level of deterrence.

I think the academic conclusion in the literature is indecisive on this particular question.

The CHAIRMAN. Professor Polinsky, you indicated that some suits that would be brought under joint and several liability might not be brought under S. 1300. What impact would this change have on deterrence and on the scheme of antitrust enforcement by private attorneys general?

Dr. POLINSKY. Well, I think that that point is related, Mr. Chairman, to your previous question, and everything else equal, bringing fewer suits will tend to lower deterrence. But my response is the same as before, that there are many considerations that have to be taken into account in deciding how much deterrence will occur under S. 1300 compared to joint and several liability.

And when one takes account of all of these considerations, again, one cannot say for sure whether deterrence will go up under S. 1300 in the aggregate, or whether it might go down.

I do not have a strong view and I do not know of anyone who has studied this issue, and looked at the scholarly literature, who has a strong view, in either direction on that question.

The CHAIRMAN. Professor Polinsky, could you elaborate on what you mean by the term "appropriate deterrence" in your written statement.

Dr. POLINSKY. What I mean by "appropriate deterrence" in my written statement is allocating liability so that conduct will be socially desirable. One does not want to have too little liability on a defendant, because bad conduct will not be properly deterred, will not be adequately deterred, and similarly, one does not want to put too much liability on potential defendants because, given the possibility of mistakes, the risk that someone engaging in socially desirable conduct will be mistakenly found liable, or will be forced to settle out of court under joint and several liability because of the risk of large liability if one does not settle out of court, one might overdeter socially beneficial conduct.

So the proper deterrence concept means that liability will equal the harm caused, suitably inflated for the chance of not being found liable.

The CHAIRMAN. The distinguished Senator from Arizona.

Senator DECONCINI. Thank you, Mr. Chairman. Let me ask a couple of questions to Judge Bell and Mr. Millstein.

Will S. 1300 increase the costs and burdens currently borne by plaintiffs?

Judge BELL. I do not think so. I could not understand Mr. Rule making that statement.

Senator DECONCINI. I do not, either.

Mr. MILLSTEIN. I do not, either.

Senator DECONCINI. And will it reduce the incentive to bring antitrust actions?

Judge BELL. Oh, no, not at all, not at all. I think you lose a "whipsaw" weapon, you do lose that, which we think is unfair, but you still would bring suits. After all, it has not been many years since somebody thought of the "whipsaw" system, and we were getting along pretty well with the antitrust laws.

Senator DECONCINI. Is there major litigation that you know of, now pending, or in the offing, that will be affected by this litigation. Have we hit the so-called "window of opportunity" where the legal landscape is relatively free of macrocases in the antitrust field?

Mr. MILLSTEIN. Senator, there is no retroactivity built into this bill. It will become law whenever it is enacted.

Judge BELL. But the question was, do we know of any litigation.

Dr. MILLSTEIN. I do not.

Judge BELL. I do.

Senator DECONCINI. You do?

Judge BELL. I have heard of some suits that have never been brought. It might be a major antitrust undertaking and somebody might have some interest in making it apply to those cases. They have never been brought and I do not know that they ever will be. That is sort of a speculative answer but I have heard of that.

Senator DECONCINI. Thank you.

Mr. MILLSTEIN. Senator, in terms of bringing antitrust cases, I think the tradition will continue. If the Government showed some signs of enforcing the antitrust laws beyond what is happening now, the tradition would continue of antitrust plaintiffs following up on Government cases. That has been the tradition.

If there is a slowdown in enforcement at the moment, that is because the Government is not bringing too many non-bid rigging cases. When the Government comes back and starts bringing cases again, private antitrust enforcement will also pick up. The tradition is that the private plaintiffs see who have been indicted and sue them, and when those government cases increase, the private suits will increase. I do not think anything is going to change.

Senator DECONCINI. Thank you. Thank you, Mr. Chairman. I have no further questions. Thank you, gentlemen.

The CHAIRMAN. Thank you, gentlemen, for your appearance.

Our next panel is Mr. Michael Brockmeyer, chief, antitrust division, attorney general's office, State of Maryland; Mr. Harold E. Kohn, Kohn, Savett, Marion & Graf, Philadelphia; Priscilla Budeiri, Public Citizens Congress Watch, Washington, DC. I believe these witnesses are opposed to the bill, all of you. We will be glad to hear from you, Miss Budeiri.

STATEMENT OF A PANEL CONSISTING OF MICHAEL BROCKMEYER, CHIEF, ANTITRUST DIVISION, ATTORNEY GENERAL'S OFFICE, STATE OF MARYLAND; HAROLD E. KOHN, KOHN, SAVETT, MARION & GRAF, PHILADELPHIA, PA; AND PRISCILLA BUDEIRI, PUBLIC CITIZEN'S CONGRESS WATCH, WASHINGTON, DC

Ms. BUDEIRI. Good morning, Mr. Chairman, and members of the committee. I am Priscilla Budeiri, a staff attorney at Public Citizen's Congress Watch. Today I am also speaking on behalf of the Consumer Federation of America.

Together, these two organizations represent more than 35 million consumers across the Nation who want the interests of consumers brought to the attention of our lawmakers.

There has been a lot of talk today about fairness. The proponents of S. 1300 have urged this committee to support this bill because it would assure fairness in the allocation and award of antitrust damages. It would also hold guilty defendants liable for the damages they cause.

Consumers agree with the premise of this bill's proponents—that is, consumers want fairness in the enforcement of the antitrust laws, too.

The antitrust laws, after all, assure the preservation of free market competition, the foundation of our economic system. A fully competitive system guarantees the best allocation of resources, the lowest prices, and the highest quality of products for consumers.

It is, unfortunately, only on the premise that we agree with the proponents of S. 1300. The law as it is now, employing joint and several liability, is the fairest and economically the soundest way of assessing and awarding damages for horizontal price-fixing violations.

What is the basis of our position? Horizontal price fixes are unique among conspiracies. Each producer of the good or service that is the subject of the price fix is indispensable to the success of the conspiracy.

If any firm in the market were to reject the conspiracy by pricing competitively, that firm would attract customers, increase its share of the market, and lessen the profits the conspirators can realize.

Even more fatal to the conspiracy would be a firm in the market which decided to disclose the existence of the conspiracy. Such a disclosure would bring the conspiracy to a certain end.

So each additional member of the market that embraces the conspiracy means one less competitor to worry about undercutting the price of the conspiracy or blowing the whistle on the conspiracy.

If there is no competition in the market, the price fix can successfully hold consumers captive. Consumers will have nowhere to turn for a choice in the price they pay for a good. Thus, it is eminently fair for each member of a horizontal price-fixing conspiracy to be held responsible for the entire damage done by the conspiracy.

There has also been much discussion today about deterrence and I am gratified that witnesses who have testified on the two panels before us agree that deterrence will be lowered under this bill.

We believe the current system is a better deterrent than the system proposed by S. 1300. After all, how could the prospect of paying less, if found guilty of an antitrust violation, be a greater deterrent than the current system of joint and several liability, where each defendant is liable for the entire harm done by the conspiracy?

In conclusion, the only group this bill will benefit is the guilty price fixers. We, therefore, urge this committee to take the side of the victims of horizontal price fixing conspiracies, that is, consumers, and reject the proposal contained in S. 1300. Thank you.

[Prepared statement and responses to questions posed by Senator Metzenbaum follow:]

PREPARED STATEMENT OF PRISCILLA BUDEIRI

Mr. Chairman and Members of the Committee:

I am Priscilla Budeiri, an attorney with Public Citizen's Congress Watch. Congress Watch is the legislative research and advocacy branch of Public Citizen, an organization founded by Ralph Nader in 1971 to espouse the interests of consumers. Public Citizen is supported by 80,000 members throughout the United States.

I am also presenting this statement on behalf of the Consumer Federation of America, a coalition of over 200 national, state and local consumer, senior citizen, labor, farm, cooperative and rural organizations together representing more than 35 million people.

We are submitting this statement in opposition to S. 1300 because that bill would substantially weaken one of the most important consumer-protection attributes of our antitrust laws. S. 1300 would change existing law by eliminating joint and several liability for defendants found guilty of horizontal price fixing.[1] Currently, the law provides that each participant in a horizontal price-fixing scheme is individually liable for the entire harm or damage by the collusive behavior.[2] Under the bill, the liability of a person found guilty of a price-fixing violation would be limited to the "actual damages attributable to such person's purchases or sales of goods or services."

S. 1300 represents a drastic change in how the antitrust laws would punish those who cause the most insidious harm possible to consumers and to our system of free market competition. The goal of horizontal price-fixing conspiracies is to eliminate the consumer's choice about how much he will pay for a good or a service. Thus, for example, S. 1300 would reduce the

---

1. Horizontal price fixing involves an agreement among competitors marketing the same good or service to set artificially the price of the good or service they produce.

2. City of Atlanta v. Chattanooga Foundry and Pipeworks, 127 F. 23, 26 (6th Cir. 1903), aff'd, 203 U.S. 390 (1906). See also In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 497 F.Supp. 218 (C.D. Cal. 1980) and Wall Products Co. v. National Gypsum Co., 357 F.Supp. 832 (N.D. Cal. 1973).

maximum penalties facing dairies which conspired to charge supercompetitive prices for milk, or airlines which collusively set the level of air fares for travel between two cities. There are only two other proposals which would have a more deleterious effect on the protection afforded consumers by the antitrust laws: repeal of the Sherman Act altogether, or abolition of the rule that price fixing is per se illegal.[3]

By mandating that price fixing be redressed by both criminal and civil suits, Congress recognized that such conduct has harmful and serious consequences for consumers and our entire economy. Congress underlined its concern about antitrust violations by amending the Sherman Act to make the criminal offense of price fixing a felony.[4] Now, corporations indicted under Section 1 of the Sherman Act face a fine of up to 1 million dollars. Individuals found guilty of a criminal price-fixing charge may be imprisoned for three years and/or fined as much as $100,000. The civil penalties facing convicted price fixers include paying those harmed by the violation three times the actual injury suffered.[5]

---

3. In 1927, the Supreme Court held that the act of agreeing to fix prices is in and of itself illegal without regard to the reasonableness of the prices agreed upon. United States v. Trenton Potteries Co., 273 U.S. 392 (1927). The Court best explained why horizontal price fixing is a per se violation of the Sherman Act in Northern Pacific Railroad Co. v. United States, 356 U.S. 1, 5 (1958). It found that price-fixing agreements have such a "pernicious effect on competition and lack . . . any redeeming virtue [such that they] are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."

4. The criminal punishment for price fixing was intensified in 1974 as part of the Administrative Procedures and Penalties Act, Pub. L. 93-528. During debate of the Act, then-Representative Heinz stated:

> It has long been a guiding principle of the Republican Party to support strong antitrust enforcement. ... The antitrust laws provide the rules for competition. They are a cornerstone in our free enterprise system. They are intended to prevent predatory conduct or combinations which unreasonably raise consumer prices. ... The antitrust laws are very important, but they cannot do the job if they are not enforced promptly and fairly, or if those who violate them receive so little punishment that it pays them to ignore the law.

120 Cong. Rec. 36,341 (1974).

5. 15 U.S.C. §15 (1982).

The Current Law Fairly And Logically Fixes Liability.

While it may seem rather severe for the law to hold one price fixer liable for the harm done by all the members of a price-fixing agreement, joint and several liability is not a new legal concept. To the contrary, it has been applied to intentional tortfeasors since seventeenth century England.[6] The reason for holding joint tortfeasors liable for the entire harm done by the tort is that "there was a common purpose, with mutual aid in carrying it out; in short, there was a joint enterprise, so that 'all coming to do an unlawful act, and of one party, the act of one is the act of all . . . '"[7]

The application of joint and several liability to horizontal price-fixing conspiracies is particularly appropriate because the participation of each member of the market is indispensable to the success of the conspiracy. If any firm in the market shunted the conspiracy and chose to compete, it would charge less than the conspiratorial price, attract consumers away from the conspiracy and increase its market share. This undercutting would threaten the very viability of the conspiracy by offering an alternative, lower price to consumers.[8] Since a price fixer will benefit financially from his competitors' concurrence in the conspiracy, it is only fair and logical that he also be subject to a fine which pays for the harm done by his co-conspirators' presence.[9]

---

6. See Prosser, Handbook of the Law of Torts §46 (4th ed. 1971).

7. Id. at 291, citing Sir John Heydon's Case, 11 Co.Rep. 5, 77 Eng.Rep. 1150 (1613).

8. In addition, the conspiracy would surely collapse if one firm in the market disclosed the existence of the price fix.

9. The application of joint and several liability to price-fixing conspiracies is also consistent with the substantive law of conspiracy. General conspiracy law provides that once a person joins a conspiracy, that person is held liable for all the illegal acts committed by his co-conspirators at any time. See United States v. United States Gypsum Co., 333 U.S. 364, 393 (1948) and United States v. Wilson, 500 F.2d 715, 727 (5th Cir. 1974), cert. denied, 420 U.S. 977 (1975) ("[A] person may join a conspiracy already formed and in existence and be bound by all that has gone on before in the conspiracy, even if it is unknown to him.").

Joint And Several Liability Promotes Other Consumer-Oriented Goals Of The Antitrust Laws.

Joint and several liability is more than a fair and logical system of assessing the fault of horizontal price fixers. It also advances important goals which preserve our system of free market competition and protect consumers.[10]

First, joint and several liability ensures that consumers injured by horizontal price-fixing conspiracies "will be able to recover the full amount of damages from some, if not all, participants" in the conspiracy.[11] This assurance is especially important when consumers are injured by collusive behavior, because the identity of conspirators is often difficult to ascertain. The Supreme Court has recognized that the hallmark of a conspiracy is its surreptitious nature and that this makes conspiracies difficult to detect.[12] Under the current system, a consumer may bring suit to recover the total amount of his damages once one member of a conspiracy has been identified. In this way, consumers can avoid spending the time and financial resources required to search for co-conspirators.

Second, joint and several liability encourages settlements because guilty defendants, faced with potentially large liability, will want to fix their liability at a lower level while minimizing their expenditures for legal fees. Settlements, in turn, minimize the expenditure of judicial and other legal resources and reduce the incidence of protracted litigation during which consumers remain uncompensated for the harm done by the conspiracy. In addition, if a plaintiff needs to know the identity of other conspirators, he may make the naming of co-conspirators a condition of settlement. Identification of other members of the conspiracy helps consumers by increasing the

---

10. It is unclear how S. 1300 would allocate liability in a horizontal price-fixing situation like bid rigging where there are no sales or purchases of goods or services.

11. Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 646 (1981).

12. United States v. Rabinowich, 238 U.S. 78, 88 (1915).

possibility that they will receive full compensation for the loss caused by the conspiracy.[13]

Finally, the current system of joint and several liability is a better deterrent than the system that S. 1300 would create. There are three reasons why this is so.

First, a firm weighing the possible costs and benefits of joining a price-fixing conspiracy has to place a higher cost in its calculus under a system employing joint and several liability than under the S. 1300 rule. Under current law, a firm's potential costs of being sued are treble the damages caused by the entire conspiracy. Under the system proposed by S. 1300, potential costs will be less: only treble the damages caused by its own "purchases or sales of goods or services."

Second, while only one firm need be identified for a consumer to recover all his damages under the current system, the pattern of settlement likely to occur under joint and several liability means that eventually every co-conspirator will probably be identified and sued.[14] Joint and several liability, therefore, operates as a strong deterrent because each firm contemplating illegal behavior must consider not only the prospect that it may be sued for the entire damage caused by the conspiracy, but also the likelihood that it will eventually be named, sued and held accountable for some share of the damage done.

Third, the application of joint and several liability increases the probability that a consumer will find it worthwhile to commence a suit even if he can initially name only one defendant. Without joint and several liability, the first defendant sued may also be the last defendant sued since it may be less costly for the defendant to pay for the damages it caused

---

13. In addition, defendants are added to the litigation by plaintiff's choice. The conduct and strategy of the litigation, therefore, remains in the hands of the consumer.

14. The first defendant will name one co-conspirator as a condition for settlement. Each successively named co-conspirator will have the same incentive to disclose a previously unidentified co-conspirator until all the conspirators have been revealed.

and refuse to name any of its co-conspirators. If it does this, the defendant may be reimbursed by its co-conspirators in return for its promise not to disclose their identities.[15] Under a system of joint and several liability, however, there is great incentive to settle and name co-conspirators. Since plaintiff consumers can expect to recover closer to the full amount of the damage caused by the conspiracy, they will have more incentive to bring suit to enforce the antitrust laws under a joint and several liability system than under this bill's system.

Conclusion

Consumers believe that the issue raised by S. 1300 is fairness. The current system of joint and several liability is an eminently fair way of assigning liability to horizontal price fixers because the collusion of every firm in the market is necessary for a successful price fix. Put another way, the conspiracy would either fall apart or be disclosed if any firm in the market did not make an affirmative choice to go along with or cover up the price fix.

In addition, the system of joint and several liability protects consumers because once a single conspirator has been identified, consumer plaintiffs may be compensated for the entire harm done by the conspiracy. The system also encourages settlement, thereby achieving the concomitant savings in judicial and legal resources. Finally, joint and several liability is a greater deterrent against horizontal price fixes than the system created by S. 1300.

For these reasons, we urge this Committee to reject S. 1300.

---

15. Currently, there is a rule against contribution in antitrust cases.

PublicCitizen

Congress Watch • Critical Mass Energy Project • Health Research Group • Litigation Group • Tax Reform Group

August 9, 1985

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Thurmond:

Public Citizen and the Consumer Federation of America are very pleased to have had the opportunity to testify before the Committee on the Judiciary on July 29, 1985 concerning S. 1300. We intend to follow the course of this bill very closely since we believe it will have a very detrimental effect on consumers if it becomes law.

I received the questions posed by Senator Howard Metzenbaum in reference to this bill which you forwarded to me. My answers to his questions are enclosed. Please have them made part of the official record. I have also sent a copy of my responses to Senator Metzenbaum.

Thank you for the opportunity to present the consumer's position on this bill. Please contact me if I can be of any help in your or the Committee's evaluation of this bill.

Sincerely yours,

Priscilla Budeiri

Priscilla Budeiri
Staff Attorney

Congress Watch • 215 Pennsylvania Avenue S.E. • Washington, D.C. 20003 • (202) 546-4996

Responses of Priscilla Budeiri
to Questions Posed by Senator Metzenbaum

1. How will S. 1300 affect deterrence for price fixing? In this respect, how does it compare with the proposals for contribution defeated in previous Congresses?

S. 1300 will adversely affect deterrence for horizontal price fixing in three ways. First, since horizontal price fixing is an intentional tort, rational businesses will conduct a dollars and cents analysis of their contemplated participation in a price-fixing conspiracy. Any legal change that reduces the possible cost of engaging in an illegal price fix, therefore, will diminish deterrence.

A firm assessing the costs and benefits of participating in a horizontal price fix will consider less potential financial costs from engaging in the illegal behavior under S. 1300's scheme than under the system of joint and several liability. Currently, the firm would weigh the impact of a maximum potential fine of three times the damages caused by the entire conspiracy. Under the scheme proposed by S. 1300, the maximum possible fine facing the firm would be less: only treble the damages caused by its own "purchases or sales of goods or services."[1] The scheme proposed in S. 1300, therefore, reduces deterrence.

Second, S. 1300 would decrease deterrence by reducing the likelihood that unidentified conspirators will be named and sued. Currently, there is pressure on a named defendant to settle and, as a condition of settlement, to identify co-conspirators. The pressure to name co-conspirators increases the likelihood that each firm involved in the conspiracy will be held accountable for its illegal behavior. Anything that increases the likelihood of a wrongdoer being caught also increases deterrence.

Under the system created by S. 1300, however, there is a greater possibility that unnamed conspirators will escape detection and, therefore, suit. Under the proposed system, a defendant has nothing to gain from identifying its co-conspirators because its maximum liability is set at the amount of purchases or sales it made, whether or not its co-conspirators are sued. If all the unnamed conspirators help pay the fine assessed on the defendant, the defendant may end up paying less damages than if it payed a settlement and disclosed the identities of its co-conspirators.[2] The system created by S. 1300, therefore, would weaken deterrence by reducing the likelihood that every member of a price-fixing conspiracy will be sued.

---

1. The bill does not address what damages could be assessed in bid rigging cases or other horizontal price-fixing schemes not involving "purchases or sales of goods or services."

2. This scenario may not occur if the market in which the price fix occurred were dominated by one large firm which shared the market with numerous small firms and the large firm was the only named defendant. In that instance, it is unclear whether the small firms would find it financially beneficial to contribute to the larger firm's payment since that payment may exceed their individual liability.

Third, the scheme proposed by S. 1300 reduces deterrence by reducing the likelihood that plaintiffs will find it worthwhile to commence a private treble damage suit to redress a horizontal price fix. Plaintiffs will not have as much incentive to institute a suit because they may only know the identity of one member of the conspiracy whose share of the "purchases or sales of goods or services" may not cover anticipated costs of suit. Since, under the proposed system, defendants will have less incentive to name their co-conspirators, plaintiffs will have little hope of identifying other conspirators whose shares of the damage would make it cost effective to bring a suit.

The system proposed under S. 1300 would weaken deterrence more than a system allowing contribution would. Under a system of contribution that preserves joint and several liability, plaintiffs would retain the ability to recover all the damages caused by the conspiracy. They will, thus, still find it worthwhile to commence a private treble damage suit. Additionally, the likelihood of a conspirator paying some share of the damage caused by the price fix would be preserved under a system allowing contribution. A firm contemplating participation in a horizontal price fix, therefore, would have to assess the strong likelihood of paying at least some damages.[3]

In sum, the current system of joint and several liability is a better deterrent than a system allowing contribution. But the system proposed by S. 1300 is by far the worst system of the three from a deterrence perspective.

2. Addressed to Mr. Brockmeyer.

3. Addressed to Mr. Kohn.

4. Are class actions important to consumers in recovering damages for price fixing?

Class actions are extremely important to consumers harmed by a horizontal price fix because class actions facilitate consumers' commencement of suits and recovery of damages. Class actions enable a consumer, whose claim may not be large enough to warrant an individual suit, to aggregate his claim with other consumers whose claims are also small. The combination of claims makes access to the courts a financially viable way for private parties to enforce the antitrust laws.

Besides providing consumers a way to share the cost of suit, class actions improve consumers' posture during litigation. For example, defendants are more likely to take a treble damage suit seriously if they believe that the plaintiffs possess the funds to prosecute the suit vigorously. An individual plaintiff would probably not have such resources at its disposal. In addition, consumers will be able to engage in broad pre-trial discovery to aid their proof of a regional or national conspiracy if a wide spectrum of victims of the price-fixing conspiracy are named as plaintiffs.

Finally, class actions benefit consumers harmed by price-fixing conspiracies by increasing the probability that at least one plaintiff will sue to enforce the final judgment if defendants do not voluntarily comply with it.

---

3. A system allowing contribution, however, would not be as strong a deterrent as the current system where price fixers could be responsible for paying treble the entire harm caused by the conspiracy.

In sum, class actions aid consumers by facilitating the commencement of suits, enabling plaintiffs to take a strong litigation posture during suit, and helping ensure that at least one member of the class will enforce the judgment against recalcitrant defendants.

5. The proponents of S. 1300 claim that this bill is necessary to prevent plaintiffs from pressuring innocent defendants to pay and small businesses to bear an unfair share of the damages. Do you agree?

No, I do not agree that this bill is necessary to prevent plaintiffs from pressuring either innocent defendants to settle or small businesses to bear an unfair share of the damages. First, if a defendant were truly innocent, there would be nothing a plaintiff could do to pressure it into paying any share of the damages. Plaintiffs could not make a credible threat to an innocent defendant that they will proceed through long and expensive pre-trial discovery and an equally long and costly trial. No plaintiff would waste resources on discovery and trial if it had no chance of prevailing due to its lack of incriminating evidence.

Second, it would not be unfair for a small business convicted of fixing prices to pay for the entire harm done by the price fix. The law has been clear since 1906 that a business of any size that is found guilty of fixing prices can be held liable for treble the total damage done by the conspiracy. Any damages the firm ends up paying, therefore, would not be unfair because the firm should have been on notice about joint and several liability. In addition, it is fair for a firm to be held liable for all the damage done by the conspiracy because damage would have been avoided had the firm chosen to disclose the existence of the conspiracy instead of joining it.

6. Let's assume that a conspiracy is alleged involving both manufacturers and retailers. How will S. 1300 affect settlement since it would only apply if a purely horizontal conspiracy is proven?

The current law of joint and several liability would presumably apply to a conspiracy involving both manufacturers and retailers unless the manufacturers and retailers were horizontal competitors. If the manufacturers sold the product directly to consumers in competition with retailers, then S. 1300 would apply. It is unclear what theory of liability would apply if the conspiracy involved a combination of both vertical and horizontal price restraints, such as resale price maintenance between the manufacturer and some retailers and price fixing between the manufacturer and other retailers.

7. What is your response to Judge Bell's comment that plaintiffs get little of the money recovered, in contrast to lawyers?

I have no data indicating how much money plaintiffs receive compared to their lawyers from the disposition of private treble damage actions.

Even assuming, for the sake of argument, however, that plaintiffs do receive a small amount of the money recovered in contrast to lawyers, S. 1300 does nothing to change how the recovery is allocated between plaintiffs and their attorneys. The bill, therefore, is not a solution to this alleged problem.

8. Under current law, do plaintiffs have to establish market share for a per se price fixing case? -- and aren't most class actions per se cases?

Currently, plaintiffs must establish that a defendant agreed to charge the set price for the good at issue to prove participation in a horizontal price fix. Proof of an agreement will involve proof that the defendant is in the market for the good, but need not entail proof of defendant's exact market share.

I do not have data indicating what percentage of class actions are per se cases.

9. Under S. 1300 though, a plaintiff must establish the amount of damages attributable to each defendant. Will this affect the ability of consumer plaintiffs, or small business plaintiffs, to win their case?

Requiring a plaintiff to establish the amount of damages attributable to each defendant would add a substantial burden to plaintiff's proof. This burden, in turn, would adversely affect the plaintiff's ability to prevail in its suit even after it has proven the existence of a conspiracy and harm to itself.

10. How will S. 1300 work in conjunction with state antitrust laws that still permit joint liability?

In the states that incorporate federal cases interpreting the Sherman Act into interpretation of the state antitrust statutes, the enactment of S. 1300 will probably cause confusion. The states will have to determine whether they will continue to follow the federal common law mandating joint and several liability or the new S. 1300 which eliminates joint and several liability.

11. Addressed to Mr. Kohn.

12. In your experience, is Mr. Millstein correct in claiming that the guiltiest get off cheap by settling first?

My experience as a prosecutor in the Antitrust Division of the United States Department of Justice does not support Mr. Millstein's claim that the guiltiest get off cheap by settling first. My experience is that the amount of a defendant's settlement is a factor of culpability and co-operation as well as time of settlement.

Senator DECONCINI [presiding]. Thank you, Ms. Budeiri.
Mr. Brockmeyer.

STATEMENT OF MICHAEL F. BROCKMEYER

Mr. BROCKMEYER. Thank you, Senator. Mr. Chairman and members of the committee, I am pleased to be here today as a State antitrust enforcer, to express my views regarding S. 1300.

As Chief of the Maryland Antitrust Division, one of my primary responsibilities is the representation of the State and its citizens to recover damages as a result of violations of the Federal antitrust laws.

In my view, S. 1300 will greatly hinder the ability of my division to carry out its responsibilities. First, S. 1300 incorrectly assumes that a coconspirator who has not dealt with a plaintiff has not injured that plaintiff. Such cannot be further from the case.

For example, it has been our experience in litigating cases of bid rigging on State projects, that in many instances, the coconspirators allocate the contract, and the designated winning bidder informs the other coconspirators of the price above which the others should submit complementary bids.

It has also been our experience that in those circumstances, the designated winning bidder pays off the complementary bidders through the award of subcontracts on that project. Under those circumstances, S. 1300 would limit the State to recovering its damages only from the successful bidder, despite the fact that the activity of all the bidders, the coconspirators, has caused the State to pay an inflated price for the project.

I find that result quite ironic in that the purpose of this bill is to ensure that the coconspirators would be responsibile for their actions. However, under S. 1300, the complementary bidders who do perform subcontracts will be permitted to keep their ill-gotten gains and the winning bidder will be liable for 100 percent of the damages.

I believe this result flies in the face of the purpose of this bill.

Second, participants in horizontal price fixing conspiracies who do not make purchases or sales, may be immune from treble damage liability. Examples of these persons would be trade associations, corporate officers, or facilitators of conspiracies.

An example of this is a recent parens patriae case litigated by Maryland and several other middle-Atlantic States involving price-fixing of automobiles.

A distributor had agreed with approximately 100 dealers to increase the price of 1980 Toyotas through application of a rustproofing package.

Our evidence was that the distributor had faciliated the conspiratorial conduct of the dealers. The case was settled for $5 million on behalf of 37,000 consumers. Nearly 60 percent was paid by the distributor and 40 percent by the dealers.

If S. 1300 were in effect at that time, the result may not have been the same. The distributor, because it did not have sales to consumers, and because it was a member of a contract, combination, or conspiracy, within the meaning of proposed section 4I(a)(1),

the State may have been precluded from making any recovery from the distributor.

This would mean that an antitrust violator in that case would be immune from treble damage liability and that only certain of the antitrust violators will be subject to any payment of damages.

Third, we believe that the legislation would hinder the ability of the State to enter into precomplaint or early post-complaint settlements for the purpose of cooperation or testimony.

If I may deviate for a moment from my statement here. In response to a question regarding bid rigging cases, Judge Bell indicated that the deterrence should be left to the Federal Government.

When the Federal Government grand jury came through Maryland investigating bid rigging cases, indictments were brought against 12 companies, resulting in $750,000 in fines. Our followup civil cases involved early settlements for cooperation with certain of the bid riggers, and resulted in settlements amounting to $2.5 million. I submit to you that our settlements of $2.5 million versus the $700,000 fines imposed by the Federal Government were much more of a deterrent to bid rigging in the State than those criminal actions.

Finally, S. 1300 may also have an adverse impact upon parens patriae cases. The concern is that under section 4D of the Clayton Act, damages may be proved and assessed in the aggregate.

Under this bill, the Attorneys General in parens patriae cases may not be able to do that.

I conclude by saying that the adverse consequences that I have identified in this legislation do not fall upon Maryland only but fall upon all States.

The States are aggressively attempting to recover damages as a result of bid rigging and also representing their consumers in parens patriae cases.

It is for this reason that in 1982, the National Association of Attorneys General unanimously adopted a resolution opposing any alteration of the rule imposing joint and several liability upon antitrust violators. It is my position that no circumstances exist today that alter that position or require passage of S. 1300. Thank you.

[Prepared statement and responses to Senator Metzenbaum's questions follow:]

Prepared Statement of Michael F. Brockmeyer

Mr. Chairman and Members of the Committee: I am pleased to be here today to express the views of a State antitrust enforcer regarding S. 1300, legislation that would limit the treble damage exposure of members of horizontal price-fixing conspiracies. As Chief of the Maryland Antitrust Division, one of my primary responsibilities is the representation of the State and its citizens to recover damages as a result of violations of the federal antitrust laws. Most of these cases involve horizontal price fixing or bid rigging. In my view, S. 1300 will greatly hinder the ability of the Maryland Antitrust Division to carry out its responsibilities to the State and its citizens. S. 1300 is ill-conceived legislation that benefits those who have committed the clearest and most serious violation of the antitrust laws; it is legislation that is detrimental to injured taxpayers, businesses, and consumers.

In my view, S. 1300 has two faulty premises. First, the legislation accepts the proposition that it is fair to limit the liability of antitrust violators and thereby to restrict the ability of victims of price-fixing conspiracies to obtain restitution for their injuries. To the contrary, it is only fair that those victims be fully compensated, that the perpetrators of those injuries pay the penalty for their conspiratorial conduct, and that others who may be tempted to participate in a price-fixing conspiracy be deterred from such participation.

Second, S. 1300 incorrectly assumes that a co-conspirator who has not dealt with a plaintiff has not injured that plaintiff. Such cannot be further from the case. For example, it has been our experience in litigating cases of bid rigging on State projects that in many instances the co-conspirators agree to allocate the contract among themselves and the designated winning bidder informs the other co-conspirators of the dollar

amount above which the others should submit a "complementary bid." The complementary bids are submitted to give the appearance of competitive bidding. The pay off by the designated winning bidder to the complementary bidders often takes the form of subcontracts on the project. Under the provisions of S. 1300, the State would be limited to recovering its damages only from the successful bidder. This result would be unconscionable because the conspiratorial activity of all members of the conspiracy caused the State to pay an inflated price for the project.

The operation of S. 1300 under these circumstances is also quite ironic. The stated purpose of this legislation is to ensure individual responsibility for damages attributable to an antitrust violator's actions. Under the bid rigging conspiracy that I have described, the complementary bidders who perform subcontracts receive direct financial benefit from their participation in the conspiracy. The provisions of S. 1300, however, would permit them to retain their ill-gotten gains; the winning co-conspirator would be liable for 100 percent of the damages. This result flies in the face of the purpose of this legislation.

Beyond these faulty premises, the effect of this legislation upon the conduct of antitrust litigation will be devastating. First, there is great uncertainty as to the full extent of the legislation's application. Participants in horizontal price-fixing conspiracies who do not make purchases or sales could be immunized from treble damage liability. Examples of these participants would be trade associations, corporate officers, and facilitators of conspiracies.

For example, in a recent parens patriae case brought by Maryland and other middle-Atlantic States, the States alleged that 100 automobile dealers had conspired with each other and their distributor to increase the selling prices of automobiles

through application of a rustproofing package. Under the scheme, the dealers paid the distributor for applying the rustproofing package and the dealers received an inflated retail price for the automobiles. The evidence indicated that the distributor developed the challenged program and that it advocated and facilitated the dealers' alleged conspiratorial participation in it. The case was settled for approximately $5 million on behalf of 37,000 consumers. Nearly 60 percent of the settlement was paid by the distributor and 40 percent was contributed by the dealers.

If S. 1300 were in effect at that time, the result may not have been the same. Because the distributor did not have sales of automobiles to consumers and because the distributor was a participant "in a contract, combination, or conspiracy among competitors," within the meaning of proposed Section 4I(a)(1), the States may have been precluded from recovering damages from the distributor. That would mean that an antitrust violator would be immune from treble damage liability, the violator could retain its ill-gotten gains and only certain of the antitrust violators would be subject to any payment of damages.

Second, assuming this structural problem could be cured, this legislation would cause a plaintiff to sue every possible company or person who could be liable for damages. Because failure to sue a company would automatically exclude from the plaintiff's case damages attributable to sales by that company, companies who would not otherwise be sued will incur the expense of defending antitrust litigation. More importantly, however, it has been our experience in treble damage litigation that either pre-complaint or early post-complaint settlements can be achieved primarily for the purpose of obtaining testimony. This is an entirely legitimate means of prosecuting a plaintiff's case and, indeed, plea agreements in return for testimony are used in virtually every criminal antitrust case prosecuted by the Department of Justice. In making a decision to enter into an

early settlement, the plaintiff must assess the value of the cooperation against the likelihood that the entirety of plaintiff's damages will be recovered against the remaining defendants. Under S. 1300, however, the loss of all claims attributable to a settling defendant would make early settlements for cooperation too speculative and, in certain cases, uneconomical. It will only be after full discovery and full analysis by an expert that the price of a settlement for cooperation can be determined. This will deter early settlements and will hinder the State's ability to obtain cooperating witnesses for the prosecution of its cases.

S. 1300 may also deter later settlements as well because of the "financial incapacity" exception to the legislation. For example, if a plaintiff enters into a settlement by making a determination that a defendant would be financially unable to satisfy a judgment, that plaintiff will need to litigate later the financial solvency of the settling defendant when he attempts to collect the judgment. This would unncessarily complicate the litigation and may cause the settlement to be too costly for its worth. In addition, a defendant may be reluctant to settle on the basis of financial incapacity because its financial condition will necessarily be litigated and thereby exposed to its competitors through discovery.

Finally, the legislation could also have an adverse effect upon parens patriae cases under Section 4C of the Clayton Act in terms of the proof and assessment of damages against defendants. S. 1300 could be read as effectively repealing the provisions of Section 4D that permit damages in parens patriae cases to be proved and assessed in the aggregate "without the necessity of separately proving the individial claim of, or the amount of damage to, persons on whose behalf the suit was brought." It has been my experience that the provisions of Section 4D are essential to the effective prosecution of large consumer cases.

The adverse consequences of this legislation upon state antitrust enforcement are not unique to Maryland. The States are aggessively attempting to recover damages for themselves as a result of bid rigging and to protect their citizens by seeking restitution in parens patriae cases. It is for this reason that in 1982, the National Association of Attorneys General unamiously adopted a resolution opposing any alternation of the rule imposing joint and several liability upon antitrust violators. No circumstances exist today that alter that position or require passage of S. 1300.

Mr. Chairman this concludes my prepared presentation. I would be happy to respond to any questions the Committee may have.

STEPHEN H. SACHS
ATTORNEY GENERAL

ELEANOR M. CAREY
DEPUTY ATTORNEY GENERAL

CHARLES O. MONK, II
DEPUTY ATTORNEY GENERAL

DENNIS M. SWEENEY
DEPUTY ATTORNEY GENERAL

MICHAEL F. BROCKMEYER
CHIEF
ANTITRUST DIVISION

OFFICES OF
THE ATTORNEY GENERAL
ANTITRUST DIVISION
MUNSEY BUILDING
CALVERT AND FAYETTE STREETS
BALTIMORE, MARYLAND 21202-1918
(301) 576-6470
WRITER'S DIRECT DIAL NUMBER

(301) 576-6470

August 28, 1985

FEDERAL EXPRESS

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Re: S. 1300

Dear Senator Thurmond:

The following are my responses to the questions propounded to me by Senator Howard Metzenbaum in regard to my testimony before the Senate Committee on the Judiciary on July 29, 1985.

QUESTION NO. 1

How will S. 1300 affect deterrence for price fixing? In this respect, how does it compare with the proposals for contribution defeated in previous congresses?

ANSWER

S. 1300 will adversely affect deterrence of price fixing because the threat of joint and several liability deters companies from initiating or joining price-fixing conspiracies. Because the rule of joint and several liability places antitrust violators at risk for all damages caused by a conspiracy, firms that are averse to such risks will not participate in price-fixing conspiracies. Until it is conclusively demonstrated that firms are not averse to such risks, in cases of price fixing--the clearest and most egregious violation of the antitrust laws--Congress should opt in favor of the greater deterrence provided by the rule of joint and several liability.

Deterrence of price fixing will be particularly reduced under S. 1300 with respect to those conspiracies that involve conspirators that will not have made any direct sales to the plaintiff. Prime examples would be price-fixing conspiracies involving trade associations, National Electrical Contractors

Ass'n v. National Contructors Ass'n, 689 F.2d 1199 (4th Cir. 1982), cert. dismissed, 104 S.Ct. 26 (1983), horizontal dealer conspiracies facilitated by a manufacturer, United States v. General Motors Corp., 384 U.S. 127 (1966), and bid-rigging conspiracies in which pay offs to co-conspirators take the form of subcontracting work rather than a later allocation of prime contracts awarded by a governmental agency.

Finally, passage of S. 1300 would have a greater adverse impact upon deterrence of price fixing than the previous proposals permitting contribution in antitrust cases. S. 1300 places upon the injured party the burden of determining by which conspirator it was damaged and how mueh of its injury is attributable to each co-conspirator. This would deter would be plaintiffs from pursuing their antitrust remedies. Past proposals permitted full recovery by an injured party and placed upon the antitrust violators the burden of litigating the issue of allocating the damages awarded. This more palatable result of the prior proposals does not, by any means, call for reconsideration of those proposals. The proposals permitting contribution in antitrust cases failed and S. 1300 should likewise be rejected.

QUESTION NO. 2

Mr. Brockmeyer, as a state law enforcement official, please discuss whether current laws are more than adequate to deter price fixing.

ANSWER

Current laws are not more than adequate to deter price fixing and the occurrence of price fixing is not declining. Evidence of this is the fact that the number of indictments brought by United States Justice Department, Antitrust Division, nearly doubled between FY 1980 and FY 1984. Virtually all of these cases involved price fixing or bid rigging.

It has been the experience of the Maryland Antitrust Division that firms participate in price-fixing conspiracies because the conspirators believe, in part, that the excess profits to be gained by participation in the conspiracy justifies the risk of detection and liability. The reduced risk of potential liability that S. 1300 will engender may further encourage participation in price-fixing conspiracies.

QUESTION NO. 5

The proponents of S. 1300 claim that this bill is necessary to prevent plaintiffs from pressuring innocent defendants to pay and small businesses to bear an unfair share of the damages. Do you agree?

ANSWER

It has been my experience while representing the State of Maryland and Maryland consumers in treble damage litigation that plaintiffs do not pressure innocent defendants to pay and that small businesses do not bear an unfair share of antitrust damages. In litigation, a defendant determines its total potential monetary exposure in a case by analyzing the plaintiff's chances of success on the merits of its claim, the amount of damages a plaintiff may recover and the cost of defending the case. A plaintiff performs a similar analysis regarding its case and in addition, determines the likelihood of collecting a litigated judgment from the defendant. These analyses lead to settlements reflecting a defendant's culpability and ability to pay. This is a fundamental result of our adversarial, judicial system.

QUESTION NO. 6

Let's assume that a conspiracy is alleged involving both manufacturers and retailers. How will S. 1300 affect settlement, since it would only apply if a purely horizontal conspiracy is proven?

ANSWER

It is not clear by any means that the provisions of S. 1300 apply only to "purely horizontal" conspiracies. For example, if a manufacturer participates in a price-fixing conspiracy among retailers, it would be a participant "in a contract, combination, or conspiracy among competitors," within the meaning of proposed section 4I(a)(1). In such cases, meaningful settlement discussions could not occur until the applicability of proposed section 4I(a)(1) was litigated. In cases such as In re Mid-Atlantic Toyota Antitrust Litigation, MDL Dkt. No. 456 (D. Md.), a case involving price fixing by a regional Toyota distributor and 100 Toyota dealers, it is often unclear whether the conspiracy may be described as horizontal or vertical. The issue will need to be litigated. In a case like the Toyota litigation, the plaintiff would argue that the conspiracy was vertical, subjecting the distributor and the dealers to joint and several

liability. On the other hand, the distributor defendant would assert that the conspiracy was horizontal, immunizing the distributor from any liability--it had no sales to consumers--and making the dealers liable for 100 percent of the consumers' injury. Mere characterization of the structure of a conspiracy cannot justify differing results being applied to the same illegal conduct.

In any event, early settlement would be impossible until the issue of the structure of the conspiracy was resolved.

QUESTION NO. 7

What is your response to Judge Bell's comment that plaintiffs get little of the money recovered, in contrast to lawyers?

ANSWER

In both Fed. R. Civ. P. 23 class actions and parens patriae cases, the amount of attorneys' fees received is subject to court approval. The court ensures both that the settlement amount is fair and adequate, City of Detroit v. Grinnell, 356 F. Supp. 1380 (S.D.N.Y. 1972), and that the fee awarded is fair, see, e.g., Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). Thus, Judge Bell has unfairly characterized plaintiffs' attorney's fee awards. In our parens patriae cases, we have received very little in the way of attorney's fees. In the Toyota case, for example, our fees were limited to the interest generated on the settlement fund and did not affect the amount that went to consumers.

QUESTION NO. 8

Under current law, do plaintiffs have to establish market share for a per se price fixing case?--And aren't most class actions per se cases?

ANSWER

No, under current law plaintiffs do not have to establish market share for a per se price-fixing case. See, e.g., Catalano, Inc. v. Target Sales, Inc., 446 US. 643 (1980) (per curiam). Yes, most class actions and most parens patriae cases are per se cases involving price fixing. It is for this reason, among others, that passage of S. 1300 will hinder the ability of the Maryland Antitrust Division to represent consumers in antitrust cases.

QUESTION NO. 9

Under S. 1300 though, a plaintiff must establish the amount of damages attributable to each defendant. Will this affect the ability of consumer plaintiffs, or small business plaintiffs, to win their case?

ANSWER

Yes, S. 1300 will impair the ability of consumer and small business plaintiffs to win their cases. Its effect will be to increase the plaintiff's burden and, thereby, increase the cost, length and complexity of antitrust cases in an area of the law that is already very complicated and burdensome. This additional burden may deter the filing of certain cases for the redress of injuries, a result directly contrary to one of the primary purposes of the antitrust laws--to punish violators and compensate injured persons.

QUESTION NO. 10

How will S. 1300 work in conjunction with State antitrust laws that still permit joint liability?

ANSWER

S. 1300 should have no effect upon the rule of joint and several liability under state antitrust laws. Nevertheless, S. 1300 may negatively impact antitrust enforcement under state laws. Defendants will argue that the provisions of S. 1300 preempt application of joint and several liability under state law. Cf. In re Cement and Concrete Antitrust Litigation, MDL Dkt. No. 296 (D. Ariz. January 23, 1985) (State statutes permitting damage recoveries by indirect purchasers in price-fixing cases are preempted by the Clayton Act as interpreted by the Supreme Court in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)). If a defendant prevails in its argument, then S. 1300 will directly impact state antitrust laws. There is also, of course, the possibility that amendments to state laws similar to S. 1300 could be enacted.

If the Committee requires further information, I am prepared to furnish it promptly.

Very truly yours,

Michael F. Brockmeyer
Assistant Attorney General and
Chief, Antitrust Division

Senator DECONCINI. Thank you, Mr. Brockmeyer.
Mr. Kohn.

STATEMENT OF HAROLD E. KOHN

Mr. KOHN. Thank you. We have prepared and filed a formal statement which we ask to have incorporated in the record.

Senator DECONCINI. Without objection it will appear in the record.

Mr. KOHN. And I will not allude to that any further. I think that my old friend, Mr. Millstein, indicated pretty clearly that people like us who use common sense do not put much stock in economists.

Perhaps I can pass from the economist to Attorney General Bell. I think the answer to Attorney General Bell's remarks is contained in the statement that Mr. Shenenfield made to a predecessor committee in 1979, when the first of these perrenial attempts to gut the bid-rigging laws first came before you by the effort through then, the device of providing for contribution to eliminate what is joint and several liability.

Let me concentrate on what Mr. Millstein said. First, if we are going to apply the rationale of common sense, and I think that is a good one on which to enter into any inquiry, on any subject. I think the first thing you want to look at is who is behind the effort to get this legislation? Who are the people paying the counsel for these proposals? Who are the people who ask that the bill be introduced? They are the people who have time and again, over the past 25 years, been found guilty of pricefixing, who have been the defendants in these cases, ever since Attorney General Rogers in the Eisenhower administration, and Bob Bicks who was then the Assistant Attorney General in charge of the antitrust division, brought what was the first of the price-fixing cases, which had led to 25 years of fairly vigorous enforcement. And they are the people now who are opposing it.

I think, in all fairness, you are certainly going to get a more dispassionate, and more objective view of what is in the public interest from the Attorneys General of the various States, from consumer interests, from Attorney General Bell when he was Attorney General, and, from the present Justice Department Chief, Mr. Rule, who testified before you.

There must be something the matter with the commonsense position of the people who want this legislation. If they find that the Justice Department is out of step, the Supreme Court was out of step, the fourth circuit was out of step—everybody is out of step except the people who are here on behalf of the people who chronically violate the antitrust laws.

Do you think it is common sense, as we approach the 100th anniversary of the antitrust laws, to ask this committee and the Congress, to single out the most obvious type of antitrust violator, those who enter into a conspiracy to fix prices, as those for whom you do the favor that you do not do for anybody else? Somebody who has entered into a merger arrangement; somebody who has done any one of the many other things that people do not do with

conscious knowledge that they are violating the antitrust laws, is not benefited by this legislation.

You benefit somebody, that any school child knows, is violating the law when he deliberately and intentionally sits down with a competitor and says, "Let us raise the prices."

He knows he is doing something unlawful. He certainly is not the one that you start with when you want to gut, if that is what they want to do with the antitrust laws.

Second, these would be the only conspirators under U.S. law, or the law of any State, who would be exempt from joint and several liability.

Every other type of conspiracy, under any other statute, under any other common law right of action, from the very beginning, has imposed joint and several liability, and to this day imposes joint and several liability on all of the coconspirators.

But no, they would have you single out this one particular group for the benefit of themselves so that they can continue with immunity to violate, or with relative immunity, yes, because they are here not to encourage measures which would promote deterrence in violating antitrust laws.

They are not here to have the Congress improve the methods of enforcement of the antitrust laws. They are here for one purpose only: To make it less onerous when you get caught violating the antitrust laws.

And I think it comes with a very hollow note, for them to be arguing that this measure will make for stronger enforcement of the antitrust laws. They are not interested in stronger enforcement, and common sense dictates that anybody who has to sit in judgment on this will come to the same conclusion.

Finally, I have been in many of these cases. I have testified before your committee now for over 20 years on all kinds of antitrust measures. I have been in many of these cases.

I think I do know what I am talking about. Nobody, with 1 percent of the market, has ever paid anything approaching 100 percent of the recovery, or has ever paid anything approaching 5 percent of the recovery.

The defendants are represented by able lawyers, these suits are under the supervision of the U. S. courts and the very able judges who sit in these courts, going through the appellate system to the court of appeals and to the Supreme Court, and the abuses they refer to simply do not exist. They never have existed, the fictitious last innocent person who was made to pay for all of the sins of all of the really guilty parties.

Incidentally, this is the first time I have ever heard any of these distinguished gentlemen say that any of their clients was every guilty of violating the antitrust laws. To that extent, this hearing has been a refreshing change.

So that there really has been no abuse in the past. They cannot point to any single instance where any of the horrors they conjure up ever have really existed, and I know that from actual experience.

So, for all these reasons, we think you ought to let well enough alone. The antitrust laws have served this Nation well. There have been periods of strong enforcement, there have been periods of

weak enforcement, but by and large, the law survived intact. It has been of tremendous benefit to the business community, and if you have any doubt about that, and you will set additional hearings, you can have a parade of small businessmen who have not violated the antitrust laws, who are interested in antitrust law enforcement, and who will be delighted to come down here and testify as to what their experience has been with respect to the antitrust laws, and with the people who seek, now, to weaken the antitrust laws. I would be glad, of course, to answer any questions.

[Prepared statement and answers to questions of Senator Metzenbaum follow:]

Prepared Statement of Harold E. Kohn

On several occasions in recent years, I have testified before the Senate Judiciary Committee (or the prior Subcommittee on Antitrust, Monopoly and Business Rights), and comparable Committees in the House, with regard to legislative proposals for contribution and curtailing joint and several liability among Defendants in price-fixing cases, including S.1438 and S.995. I, as well as a number of other experienced practitioners, opposed those Bills, and no Bill was enacted by the Senate or House.

The current Bill suffers from some of the same infirmities as the prior proposals, as well as some new ones. Accordingly, my conclusion about S.1300 is identical to my conclusion with respect to the prior bills. The proposed legislation is unnecessary and will create rather than resolve problems.

I am a senior member of the firm of Kohn, Savett, Marion & Graf, P.C., 2400 One Reading Center, 1101 Market Street, Philadelphia, Pennsylvania, and 1401 New York Avenue, N.W., Washington, D.C. I was admitted to practice in 1938, and, for the last 30 years or more, I have had extensive antitrust practice, representing both Plaintiffs and Defendants, including major Defendants, in antitrust cases. By designation of courts throughout the country in a dozen or more cases, I have been lead counsel or co-lead counsel for Plaintiffs in class action antitrust and securities litigation.

I was among the lead counsel for Plaintiffs in the Electrical Equipment antitrust cases in the early 1960's, representing the Philadelphia Electric Company, the Government of India, scores of Rural Electrification Administration Cooperatives, municipal and other claimants. I

successfully tried the first of three such cases to go to trial, thereby leading to the settlement of many others.

During the past 20 years, I have testified many times before Committees of the Senate and House on antitrust and litigation procedural matters.

By invitation, I have spoken and appeared in panel discussions sponsored by the American Bar Association, most recently at the ABA meeting in London, various state and local Bar Associations, the Judicial Conference of the Third Circuit, the Practicing Law Institute, and similar groups.

I was Chief Trial Counsel in the Plywood litigation in which the jury returned a substantial verdict against non-settling Defendants.

It is my opinion that the proposed legislation, which really is an old idea in new form, is unnecessary, and is contrary to the public interest. The reasons for this view summarized briefly are as follows:

(1) To this day, despite all the proposals designed to destroy joint and several liability, no one has yet demonstrated that any such Bill is necessary. The antitrust laws have functioned for 90 years with joint and several liability. No company has thereby been destroyed or bankrupted. No Defendant which has approached litigation in a practical, businesslike and sensible manner has been unjustly or harshly penalized. Literally hundreds of major corporations in the United States have been able to cope with the problem of restitution for antitrust violations despite joint and several liability.

Indeed, Defendants always have the right of self-help to dispose of any potential problem of allocating damages, by executing "sharing agreements", which allocate damages among them, as they see fit, tailored to the specific needs of their litigation, without interference from Plaintiffs, Court or Congress.

(2) Although it is not clear from the text of the proposed Bill, it apparently is intended to apply only to price-fixing, and does not eliminate joint and several liability in litigation against Defendants who honestly thought they were not violating antitrust laws (in suits alleging exclusive distributorships, refusals to deal, tie-ins, predatory pricing, and attempted monopoly). But why should Congress help Defendants who have been found to have engaged in the crassest criminal horizontal, conspiratorial price-fixing? Price-fixers know precisely what they are doing, do it intentionally, indeed often make it a way of life, as exposed by litigation in many related product lines, such as in the forest products cases. These are corporations which have performed criminal acts, willfully and intentionally violating the criminal laws of the United States.

It is worth noting that when The Honorable Griffin Bell, one of the chief proponents of the legislation, was Attorney General of the United States, he authorized a representative of the Department of Justice to testify about the need for a Bill similar to the one now espoused, and that representative expressed real misgivings about the legislation. John Shenenfield, Esquire, the Assistant Attorney General of the Antitrust Division, testifying on behalf of the Department of Justice, on Friday, June 8, 1979, before the Subcommittee on Antitrust, Monopoly and Business Rights on the Committee of the Judiciary of the United States Senate, in fact testified that in his experience, there was no problem with respect to the rights of small Defendants, which is of course the group of businesses S. 1300 is purportedly designed to protect. Mr. Shenenfield said:

> "One of the questions that has occurred to me in examining this issue from my own experience in

antitrust law is just how severe the problem sought to be remedied here really is. We have discussed this issue with some members of the antitrust bar, and we find a little bit of the same kind of puzzlement.

"For instance, how often do antitrust defendants, particularly small defendants, who may not have been particularly culpable, get left holding the bag? How frequently are small defendants coerced by plaintiffs into forgoing a legitimate claim of innocence?

"I was surprised in thinking this over. In my Antitrust Review Commission experience, I don't recall anybody mentioning this as a problem. I am subject to correction on that, because it may have been in one of the submissions I never saw, but it is clear, at least that it wasn't at the top of the list of problems that needed to be remedied on behalf of the people who approached us. While that isn't a good reason for failing to proceed, I grant you, it does give me some pause in my consideration of how severe the problem may be.

"All of us in that room who are interested in strong antitrust enforcement share this concern: We wish to be quite confident that we are not giving up more in the way of antitrust enforcement than we are protecting in the way of fairness to all the parties."

*Testimony of John Shenenfield, Assistant Attorney General, Antitrust Division, Department of Justice, on Antitrust Equal Enforcement Act of 1979, S.1468, June 8, 1979, Serial No. 96-27, pp. 4-32.

Later in Mr. Shenenfield's testimony, he explained why contribution should not be applicable to price-fixing cases:

". . . One begins, if you want to examine each of those questions a little bit, first with the question of what type of antitrust violation you wish to have addressed. This proposal addresses price fixing. Some of my staff did a little research into the history of contribution and found it is most frequently used in cases of unintentional torts. The English common law confined it to unintentional torts and did not permit it in cases involving intentional torts. American judges, historically have not made this distinction as clearly. The general rule today, at least if you look to the restatement of torts, in this country still denies contribution among intentional tortfeasors, although it is clear that some judges have permitted contribution among intentional tortfeasors, and many States also permit it.

"Intent in the antitrust context, and certainly in the civil antitrust context, is not as crucial an ingredient as it is in tort litigation. There may be other ways to make a similar distinction in antitrust cases if this difference between intentional and unintentional torts is crucial because of the deterrence issue. You would want to deter intentional conduct, but you also might want to spread the risk if conduct is truly unintentional. There may be ways to grasp that kind of distinction in the antitrust area that would be just as helpful.

"For instance, instead of applying contribution to all antitrust violations, you might wish to confine it to rule of reason violations, to allow it only for noncriminal violations, or perhaps allow it for only particular categories of violations, the reason being that contribution has commended itself to judges as a means of spreading risk without affecting deterrence where you are dealing with unintentional torts. However, the analogy of that would be rule of reason cases in the antitrust field rather than the per se variety of cases. . . . " (emphasis supplied).

*Testimony of John Shenenfield, Assistant Attorney General, Antitrust Division, Department of Justice, on Antitrust Equal Enforcement Act of 1979, S.1468, June 8, 1979, Serial No. 96-27, pp. 4-32.

While that testimony technically referred to contribution proposals, the same arguments apply with equal force to S.1300 which is intended to achieve the same result by eliminating joint and several liability.

(3) The proposed legislation in effect jettisons the law of conspiracy. Under the proposed Bill, conspirators will no longer be liable for the misdeeds of fellow conspirators. The co-conspirator's liability doctrine is a powerful weapon in private antitrust enforcement. It reduces the incentive for companies to conspire, particularly small companies who may have little to gain and a great deal to lose. The proposed legislation, however, may be an invitation to conspire, for a potential conspirator can easily calculate the outside reach of its liability, and make a business decision whether or not to take the risk.

(4) The operation of Rule 23 will be dramatically altered and will no longer play as effective a role in private enforcement. Under the present scheme, any customer who has done business directly with any Defendant has standing to sue all Defendants under the antitrust laws, and may bring a class action on behalf of all others who also did business directly with one or more of the Defendants. The proposed legislation would appear to change that, for the legislation in effect alters well-established doctrines of standing. It would seem that if a conspirator is liable only for its own purchases or sales, then a Plaintiff can only sue the conspirator who has sold to it or from whom it purchased. This standing issue would render many Rule 23 actions impossible to bring, or unmanageable if brought. I suspect this is exactly what the proponents of the legislation intended.

(5) The proposed legislation is a substantial deterrent to settlement, and of course, without settlements, litigation cannot proceed in an expeditious manner. The proponents of the legislation argue that the Bill is intended to protect the small businessman. Frankly, it will have precisely exactly the opposite effect.

Now, Plaintiffs have the flexibility to settle cases with small businesses for a lesser figure than we settle with larger companies. At present, we can settle early with a smaller company at a more modest figure than we would require from a larger company even if it happens to have a substantial share of the market. This legislation will change that. For example, even if a Defendant is a smaller company who made very little money but has a larger share of a particular market, the legislation will force Plaintiffs to demand a very large settlement from it. The smaller company's affluent co-conspirator, however, will be required to pay only a fraction of the amount demanded of

the smaller business. Accordingly, while the proposed legislation purports to protect the small company, it is actually anticompetitive, for it gives prosperous companies a dangerous weapon against their smaller competitors. The legislation will also require smaller Defendants to remain in the litigation and carry the substantial and burdensome costs of defense.

(6) This leads to the next subject, the confusion which marks the pending Bill. The Supreme Court anticipated exactly such a problem in the opinion in Texas Industries, Inc. v. Radcliff Materials, 451 U.S. 630 (1981), in which the Chief Justice of the United States listed some of the problems of allocating or apportioning liability which must be carefully considered if any legislation is to be rational. As the Supreme Court observed in Texas Industries, attempts to divide or apportion damages among groups of co-conspirators create more difficult problems. This is because the participation of each co-conspirator in the conspiracy might have varied. Some of the conspirators might have caused greater damage to their customers than other conspirators did. Some of the conspirators might have profitted more than others. Some conspirators might have been merely followers, others leaders. In the words of the Court: "One may be a 'giant', others 'pygmies'." 451 U.S. at 637. The Supreme Court, while observing that damages could be allocated according to market share, concluded that no matter what rule was adopted for allocating damages, the complexity of the problems thus created might in itself result in additional trial and pretrial proceedings, thus adding further complexity to what is already complex.

Turning to the text of the legislation, it is not a model of clarity.

Sections 4I(a)(1) and (2) are apparently intended to confine the application of the Bill to price-fixing

cases, but that is not at all clear. It could be equally applicable to territorial allocation, tie-ins and other antitrust violations.

Sections 4I(b)(1) and (2) provide that the Bill shall not apply if a portion of the damages has been caused by someone beyond the reach of our federal courts, or if someone is financially incapable of satisfying a judgment. It is impossible to determine which Defendants will be held responsible for a foreign corporation's or bankrupt's participation in a conspiracy, or how liability will be apportioned among the remaining Defendants.

In conclusion, I submit that the old adage, "If it ain't broke, don't fix it" should be applied here. There should be no legislation enacted unless there is a need for it. Price-fixing cases under Rule 23 have been filed and resolved for over 15 years. There is no instance where any small businessman has been put out of business because of a price-fixing case.

There is another maxim, "For every solution, there is a problem." That is precisely what the effect of this legislation will be, for in an attempt to solve problems which do not really exist, real problems will be created.

Accordingly, your Committee is most respectfully requested to vote its disapproval of the proposed legislation. It is opposed to the public interest.

KOHN, SAVETT, MARION & GRAF, P.C.

2400 One Reading Center / 1101 Market Street

PHILADELPHIA, PENNSYLVANIA 19107

1985 SEP -9 PM 3 35

WASHINGTON OFFICE

HAROLD E. KOHN
STUART H. SAVETT
DAVID H. MARION
RAYARD M. GRAF
SAMUEL E. KLEIN
DAVID H. WEINSTEIN
ROBERT A. SWIFT
WAYNE W. THOMAS
DIANNE M. NAST
ELKAN M. KATZ
ROBERT J. LaROCCA
KATHERINE HATTON
BARBARA A. PODELL
JOSEPH C. KOHN
WILLIAM B. LEVTON
MARY E. KOHART
KATHARINE RYAN
JEANNE P. MIROBLESKI

KOHN, WEINSTEIN, COHEN & HAUSFELD
SUITE 600
1920 N STREET, N.W.
WASHINGTON, D.C. 20036
(202) 659-1100

JERRY S. COHEN
HERBERT L. WEINSTEIN
MICHAEL D. HAUSFELD
STEVEN L. TOLL
PATRICIA T. BAK
ANN C. HAINER
LISA M. MEZZETTI

MEMBERS
DISTRICT OF COLUMBIA BAR

September 5, 1985

Honorable Strom Thurmond
Chairman, Committee on Judiciary
United States Senate
Washington, D.C. 20510

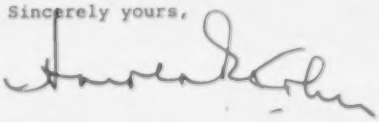
Dear Senator Thurmond:

In response to your letter of July 30, I am enclosing the answers to the questions of Senator Howard Metzenbaum.

Some of the information requested was covered by my prior testimony and my written presentation, so that reference should be made to those materials in addition to the response submitted herewith.

With my personal regards,

Sincerely yours,



HEK/k
Enc.

Response Of Harold E. Kohn
To Questions Presented As A Follow-Up
To July 29, 1985 Hearing on S. 1300

1. How will S. 1300 affect deterrence for price-fixing? In this respect, how does it compare with the proposals for contribution defeated in previous Congresses?

S. 1300, as I pointed out during my testimony, will materially adversely affect deterrence of price fixing. It is substantially similar to the contribution proposals defeated in previous Congresses. The same groups who were responsible for pushing the contribution legislation are endeavoring by this alternative to accomplish the same purpose, that is to give themselves freedom to fix prices and avoid personal liability for the overcharges.

2. Directed to Mr. Brockmeyer.

3. Mr. Kohn, as a practicing litigator, how will the requirement that a plaintiff only recover from his or her own sellers affect the ease in which a plaintiff can establish himself or herself as an adequate representative of a class under the federal rules?

-- How will S. 1300 affect the likelihood of class certification under the rules?

S. 1300 would make it extremely difficult to process class litigation under Rule 23 of the Federal Rules of Civil Procedure. Unless the class representative purchased from every one of the defendants, which is most unlikely, the defendants undoubtedly would claim that he was not an adequate class representative, and this view would probably find support among courts, particularly those which are not sympathetic to Rule 23 or to vigorous enforcement of the antitrust laws. That also, in my opinion, is one of the purposes behind the advocacy of S. 1300.

4. Directed to Ms. Budieri.

5. The proponents of S. 1300 claim that this Bill is necessary to prevent plaintiffs from pressuring

innocent defendants to pay and small businesses to bear an unfair share of the damages. Do you agree?

I do not agree. This claim has been made again and again by those who want to weaken the antitrust laws. There has been no such pressuring of innocent defendants; none has been put out of business, and all have paid much less then the actual damage caused by them when they settle such litigation. The records of testimony over the years before this Committee is clear on this issue. It is a spurious non-issue.

6. Let's assume that a conspiracy is alleged involving both manufacturers and retailers. How will S. 1300 affect settlement, since it would only apply if a purely horizontal conspiracy is proven?

In my opinion, there is some confusion as to what S. 1300 does apply to. I do not think it is clear that it affects only horizontal conspiracies. As I previously testified, most of these legislative proposals are very poorly drawn and are bound to cause endless litigation on the basic issue of what they really mean. There is absolutely no reason for singling out the most vicious kind of antitrust violation, namely horizontal price fixing, for specific exemption from the antitrust laws, which is what S. 1300 purports to do.

7. What is your response to Judge Bell's comment that plaintiffs get little of the money recovered, in contrast to lawyers?

A completely candid answer to Judge Bell's statement would probably be unprintable. There is absolutely no foundation for the continuing calumny circulated by large defense oriented firms like Judge Bell's, to the effect that most of the recovery goes to plaintiffs' lawyers. In the Plywood case, for example, the total fee was less than 15% of the recovery. In some cases, it has been slightly higher. I know few, if any, cases where it has exceeded

25%. The fees are subject to court Order, unlike the fees paid by the defendants to their lawyers, including Judge Bell's firm. I have no actual knowledge of what fees have been paid to defendants' lawyers in cases where we were plaintiffs. I do, however, have some idea as to their fee arrangements, and I gravely doubt if fees received by plaintiffs' counsel exceed fees paid to defendants' counsel. It is time to lay this issue to rest once and for all.

8. Under current law, do plaintiffs have to establish market share for a per se price fixing case? -- and aren't most class actions per se cases?

Plaintiffs do not have to establish market share in a per se price fixing case. Many class actions are per se cases, but there are others which are not. However, even in those other non per se cases it ordinarily is not necessary to establish market shares under existing law, because defendants are jointly and severally liable.

9. Under S. 1300 though, a plaintiff must establish the amount of damages attributable to each defendant. Will this affect the ability of consumer plaintiffs, or small business plaintiffs, to win their case?

This would affect the ability of all plaintiffs, including consumer plaintiffs, small business plaintiffs, and larger business plaintiffs, many of whom have been claimants in price fixing cases, in proving their cases.

10. How will S. 1300 work in conjunction with state antitrust laws that still permit joint liability?

It would cause a tremendous amount of confusion, particularly in states such as California, where there has been active enforcement of antitrust laws.

11. Mr. Kohn, roughly what percentage of plaintiffs who recover are small businesses?

Most of the recoveries are by small businesses. I do not believe there are any reliable statistics as to the

exact percentage. We do know that in most cases there are thousands of claimants to whom distributions are made, and the cumulative total of such distributions is well over 50% of the recovery. If more detailed information were desired, it could be obtained from the distribution schedules which are on file with the court clerks, the accounting firms, or other organizations which took care of the distributions. However, as I have testified, in addition to the small businesses there are substantial recoveries for large businesses which include such claimants as Coca Cola, Anheuser-Busch and Exxon, to name only a few, as well as many others. Of course, many of these are also defendants in antitrust cases where their interests as defendants far outweigh their interests as claimants.

12. In your experience, is Mr. Millstein correct in claiming that the guiltiest get off cheap by settling first?

As I indicated during my testimony, Mr. Millstein is not correct. Those who settle first are not necessarily the guiltiest, and are not necessarily the least guilty. They are companies which take a more intelligent view of their responsibility when they are found to have violated antitrust laws, who do not believe it is intelligent to waste millions of dollars on counsel fees hoping to wear out plaintiffs by a "million for defense not a penny for tribute" approach and who are advised by able counsel, more interested in resolving litigation than in accumulating large counsel fees for themselves.

Senator DECONCINI. Thank you, Mr. Kohn. I do not have at my fingertips references to dispute your statement that no one ever has been a small antitrust violator, or that a potential violator or defendant has yet to be held liable for all or part of an antitrust penalty. But would you dispute that it is possible for a potential defendant to be held liable?

Mr. KOHN. It is a theoretical——

Senator DECONCINI. Might a dependent with a small market share be liable under the present law to have imposed upon him the full damages for the wrong of all the conspirators, trebled?

Mr. KOHN. Yes. It is a theoretical, technical, philosophic——

Senator DECONCINI. All right. Given that, is that fair, to have a law that has a theoretical, technical capability of doing that?

Mr. KOHN. Yes. It is a metaphysical possibility that does not exist in the real world, and if you are met with changing the law, so that you eliminate that theoretical, nonexistent real possibility in the world, and instead, as the alternative, weaken the antitrust laws, so that people who chronically violate them will be able to continue to violate them with impugnity, and be given a pat on the back and strengthened in their course of violations, then I say that what is proposed here is not fair, because we have to deal—and let us take Mr. Millstein's test, with common sense, and if something is not going to happen, namely, somebody with 1 percent to pay 100 percent——

Senator DECONCINI. Well, what about somebody with 10 percent or 25 percent?

Mr. KOHN. Well, when you get up to 25 percent, then it becomes a matter of negotiation, and I think those counsels who have represented people with 25 percent of the market will not be able to give you any instance where that person has paid a disproportionate part of the settlement. Let me tell you——

Senator DECONCINI. Well, let me ask you this: Is it fair for someone who is 25 percent, either guilty or potentially charged with the violation, to have to bear the whole 100 percent, and have that trebled?

Mr. KOHN. If a person with 25 percent of the market——

Senator DECONCINI. Is that fair, in your opinion?

Mr. KOHN. Let me answer the question. I think if a——

Senator DECONCINI. I want to know, do you think it is fair. I do not want a long dissertation. I understand your position. I want to know, do you think that is fair? If you do, fine.

Mr. KOHN. I would like to give you the answer and give you my reasons.

Senator DECONCINI. OK.

Mr. KOHN. It is fair, and I think it is fair because anybody that has 25 percent of the market, and deliberately enters into a price-fixing conspiracy, should pay whatever he happens to get stuck with because of what his coconspirators do, and I say finally, no such situation has ever existed.

Nobody with 25 percent of the market has ever paid 100 percent of the damage recovery, and particularly, not where he approached it as the other three-quarters of the market approached it, and tried to adjust the thing amicably on a settlement basis, on the basis of common sense.

So that is, while not so patently metaphysical, it is in the practical real world something which, in my 20 years of experience, has never occurred, and I challenge any one of these experienced gentlemen who represent these people, sitting in back of me, to point out an instance where it has.

Senator DECONCINI. So, sir, your position is that if you are a one percent violator, it is unfair, but it will not ever happen. If you are a 25 percent violator, it is fair but it will not ever happen?

Mr. KOHN. No, I did not say that. At least I do not think I said that.

Senator DECONCINI. That is what I think you said.

Mr. KOHN. I thought theoretically, if somebody with 1 percent paid the entire 100 percent, it might be considered by some people as unfair.

Senator DECONCINI. Well, you said you thought that was unfair, did you not?

Mr. KOHN. I do not want to quarrel with you, Senator. I have said what I said. I think in both instances the question——

The CHAIRMAN. Well, just tell us what you did say and let's clarify it.

Mr. KOHN. That will show in the record. I think in each instance there is no problem of unfairness because it does not exist. It is a theoretical, philosophic argument which is—it has no relationship to what has ever happened, or ever will happen.

Senator DECONCINI. Excuse me. Mr. Chairman, I was asking the theoretical argument, that if a defendant with 1 percent of market share had to pay damages caused by all conspirators, trebled, is it fair? I thought he said that he thought that was unfair.

The CHAIRMAN. Well, let him answer it again if there is any question.

Senator DECONCINI. But now he says that that is fair.

The CHAIRMAN. Well, answer the question that he has asked you now, then.

Mr. KOHN. Is it unfair?

Senator DECONCINI. Yes. Is it unfair? That is all I want to know.

Mr. KOHN. It is not unfair because it does not exist.

Senator DECONCINI. OK. What if it does exist, is it unfair, hypothetically?

Mr. KOHN. If it did exist, I do not think it is unfair——

Senator DECONCINI. OK; fine.

Mr. KOHN [continuing]. To impose the penalty upon someone who deliberately——

Senator DECONCINI. That is all I wanted to know.

Mr. KOHN [continuing]. Violates the law.

Senator DECONCINI. That is all I wanted to know, Mr. Kohn. If you do not think it is unfair, I am not trying to make you say it is fair. I just want to know what you think.

Mr. KOHN. It is like saying that we should no longer have criminal laws because—and prosecutions, because occasionally, somebody who was actually innocent may be convicted of murder or whatever. That does not mean that you eliminate the antitrust law—I mean, that you eliminate the criminal laws because some unfortunate person may be convicted, and I think it—I have never

seen any, any person who was innocent convicted of violating the antitrust laws, but I think the analogy is apt.

Senator DECONCINI. Are you familiar with the *Olson Farm, Inc.* v. *Safeway Stores,* a tenth circuit 1979 case?

Mr. KOHN. The name does not ring a bell. Could you tell me what the——

Senator DECONCINI. Well, I just have the reference to the case and I do not have the full case before me.

Mr. KOHN. The name of the case does not ring a bell with me.

Senator DECONCINI. OK. In that particular case Olson Farms, against whom egg producers recovered treble damages under Federal antitrust law because of fixing of prices for shell eggs, brought action against its coconspirator seeking contributions. Even though Olson Farms was responsible for only 11 percent of the illgotten gains, they were still held accountable for 100 percent of the damages, trebled. I will secure the full case for inclusion into the record.

Mr. Chairman, I have no further questions.

[Aforementioned follows:]

OLSON FARMS, INC.,
Plaintiff-Appellant,

v.

SAFEWAY STORES, INCORPORATED; Countryside Farms, Inc.; Gusto Marketing Systems, Inc.; Egg Products Company; and Snow White Egg Company, Defendants-Appellees.

No. 77-2068.

United States Court of Appeals,
Tenth Circuit.

Argued March 16, 1979.

Decided Nov. 8, 1979.

Petition for Rehearing and Rehearing
En Banc June 30, 1981.

Before HOLLOWAY and McWILLIAMS, Circuit Judges, and MILLER,* Judge.

MILLER, Judge.

This appeal is from an order of the district court for the District of Utah dismissing the complaint of Olson Farms, Inc. ("Olson Farms"), a Delaware corporation,[1] on motion of defendants-appellees. Olson Farms filed its complaint on March 12, 1975. As amended, the complaint states that the claim "arises under the laws of the United States and arises out of Acts of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." It seeks a declaratory judgment that Olson Farms is entitled to contribution or, in the alternative, indemnity from defendants-appellees[2] with respect to a judgment against it on a jury verdict in an antitrust suit in the district court for the District of Utah. The suit was by fourteen egg producers against Olson Farms and Oakdell Egg Farms, Inc. The judgment amounted $1,950,827.23, representing damages of $574,593, trebled (15 U.S.C. § 15), plus attorneys' fees and costs,[3] and ran against Olson Farms only, injunctive relief being granted against Oakdell Egg Farms, Inc. The egg producers' claims were for the difference between what they were actually paid for their eggs and what they would have been paid but for a price fixing conspiracy in violation of section 1 of the Sherman Act and a conspiracy to violate section 2 of that Act (monopoly) in the distribution of shell eggs in Utah and Franklin County, Idaho. 15 U.S.C. §§ 1 and 2.[4] Olson Farms' complaint also states that the egg producers had claimed sales and damages as follows:

Egg Buyer	Sales (doz.)	Claimed Damages
Safeway Stores, Inc.	6,297,999	$ 271,129
Egg Products Co.	4,497,222	197,618
Snow White Egg Co.	3,574,070	157,052
Countryside Farms, Inc., and Gusto Marketing Systems, Inc.	2,724,824	119,961
Olson Farms	2,288,650	99,656

In its complaint, Olson Farms contends that, without contribution or indemnity, defendants-appellees (its alleged coconspirators) would be unjustly enriched by the amount of the antitrust judgment against Olson Farms attributable to the eggs bought by defendants-appellees.

[1] Defendants-appellees moved to dismiss the complaint for failure to state a claim upon which relief could be granted. In opposition, Olson Farms argued, *inter alia*, that: (a) it had purchased eggs from only three of the fourteen plaintiffs; (b) it had purchased only eleven percent of the total eggs sold by the plaintiffs during the damages period, which covered years prior to 1972; and (c) most if not all of the remaining eighty-nine percent was purchased by defendants-appellees. By order dated October 21, 1977, the district court

* The Honorable Jack R. Miller, Judge of the United States Court of Customs and Patent Appeals, sitting by designation.

1. Safeway Stores, Inc., is a Maryland corporation doing business in Utah; the other defendants-appellees are Utah corporations.

2. On motion of Olson Farms, Snow White Egg Co. was added as a defendant by order dated May 23, 1977.

3. The judgment was affirmed by this court on appeal. *Cackling Acres, Inc. v. Olson Farms, Inc.*, 541 F.2d 242 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122, 97 S.Ct. 1158, 51 L.Ed.2d 572 (1977). On or about March 23, 1977, Olson Farms satisfied the judgment which, with interest, amounted to in excess of $2,400,000.

4. The conspiracies involved Olson Farms and, allegedly, defendants-appellees and some twenty other business firms and individuals. The jury found that violations occurred under both sections 1 and 2 of the Sherman Act affecting all fourteen egg producers, but awarded damages to four producers under section 1 and to ten producers under section 2. It did not specifically find that defendants-appellees had violated the antitrust laws, although such a finding could be inferred from the producers' claimed sales to defendants-appellees and the claimed damages attributable thereto.

granted the motion to dismiss, holding that Olson Farms had stated no valid claim for contribution or indemnity under either federal or state law[5] and that the claim of unjust enrichment was but an expression of the claim for contribution or indemnity. It said:

> The court is of the opinion that under the circumstances of this case the availability of indemnity or contribution to the plaintiff for alleged violation of antitrust laws is governed exclusively by the Federal antitrust laws and that said laws afford no such remedy. The court is further of the opinion that no actionable claim for indemnity has been alleged in the complaint. In any event, the requirements for a cause of indemnification are not found in the circumstances of this case.

Contribution

[2] Neither the Sherman Act nor the Clayton Act provides for a right of an adjudicated antitrust conspirator to contribution from his coconspirators. Nor does such a right exist under Federal common law. Thus, in *Union Stock Yards Co. v. Chicago, Burlington & Quincy Railroad Co.*, 196 U.S. 217, 224, 25 S.Ct. 226, 227, 49 L.Ed. 453 (1905), a suit involving negligent tortfeasors, the Supreme Court declared:

> [T]he general principle of law is well settled that one of several wrongdoers cannot recover against another wrongdoer, although he may have been compelled to pay all the damages for the wrong done.

And again, in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285, 72 S.Ct. 277, 279, 96 L.Ed. 318 (1952), the Court, noting that the admiralty rule of contribution is an exception to the general *common law* rule and citing the *Union Stock Yards Co.* case, stated:

> In the absence of legislation, courts exercising a common-law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors.

This court, too, has recognized that "[t]he general rule is that, in the absence of express contract, there is no contribution between joint tort-feasors." *Security Insurance Co. of New Haven v. Johnson*, 276 F.2d 182, 185 (10th Cir. 1960).[6] *See also Goldlawr, Inc. v. Shubert*, 276 F.2d 614, 616–17 (3d Cir. 1960); *Sabre Shipping Corp. v. American President Lines*, 298 F.Supp. 1339 (S.D.N.Y.1969).

With one exception,[7] the cases cited by appellant for an exception to the general rule have not involved violation of the antitrust laws. For example, appellant relies upon *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978, 95 S.Ct. 1980, 44 L.Ed.2d 470

5. In its complaint, Olson Farms also alleges that it is entitled to contribution from defendants-appellees as joint tortfeasors under the State of Utah's contribution statute (Utah Code Ann. § 78-27-39 et seq.), but the district court concluded that this was without merit because (1) Olson Farms' right to contribution "is governed exclusively by the Federal antitrust laws," and (2) the wrongful acts occurred prior to the effective date of the statute (May 8, 1973). Although the latter conclusion appears to be correct, *Brunyer v. Salt Lake County*, 551 P.2d 521 (Utah 1976), it is unnecessary to reach the issue since it is our conclusion that a right of contribution arising under the federal antitrust laws is a matter of federal law. *Sola Electric Co. v. Jefferson Co.*, 317 U.S. 173, 176, 63 S.Ct. 172, 173, 87 L.Ed. 165 (1942); *see also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 346, 91 S.Ct. 795, 810, 28 L.Ed.2d 77 (1971), and *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc. v. La Maur Inc.*, 594 F.2d 1179 (8th Cir. 1979). For dictum to the contrary, *see Webster Motor Car Co. v. Zell Motor Car Co.*, 234 F.2d 616, 619 (4th Cir. 1956).

6. W. Prosser, *Law of Torts* § 50 at 306–07 (4th ed. 1971), states that the great majority of our courts have refused to permit contribution. He criticizes this position, but only in the case of "equally, unintentionally responsible" defendants. *See* Restatement of Restitution § 88 (1937).

7. *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc. v. La Maur Inc.*, 594 F.2d 1179 (8th Cir. 1979), discussed *infra*.

(1975), where the court adopted the position of the small number of states that have *judicially* recognized a right to contribution in favor of an *unintentional* tortfeasor. As an intentional violator of the antitrust laws,[8] appellant can take no comfort from that case. In that respect, the words of the court in *Sabre Shipping Corp. v. American President Lines*, *supra* at 1346, are pertinent:

> If the Supreme Court [in the *Union Stock Yards* and *Halcyon Lines* cases] was reluctant to depart from the rule as between unintentional tortfeasors, ... how presumptuous it would be for this Court to do so for the benefit of intentional wrongdoers, whose acts are so severely castigated by Congress, to the point of providing criminal sanctions including imprisonment.

Olson Farms argues that there was no showing in the *Cackling Acres* case that its misconduct was "active" and, rather, that its misconduct was passive, apparently on the basis that it did not organize the conspiracies but joined them after they were under way. The Supreme Court has answered this in *United States v. Paramount Pictures*, 334 U.S. 131, 161, 68 S.Ct. 915, 931, 92 L.Ed. 1260 (1948):

> For acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one.

Olson Farms also argues that cases arising under the federal securities laws "offer a compelling analogy" in support of contribution in antitrust actions. Recognizing that certain sections of those laws expressly provide for contribution, appellant relies, *inter alia*, on cases indicating that contribution was allowable notwithstanding that the involved (antifraud) section did not expressly provide for contribution. *Alexander v. Baldwin, Inc. v. Peat, Marwick, Mitchell & Co.*, 385 F.Supp. 230 (S.D.N.Y. 1974); *Getter v. R. G. Dickinson & Co.*, 366 F.Supp. 559, 569 (S.D.Ia.1973); *deHaas v. Empire Petroleum Co.*, 286 F.Supp. 809 (D.Colo.1968), *modified*, 435 F.2d 1223 (10th Cir. 1970). However, the "analogy" provided by such cases falters on the fact that Congress expressly provided for contribution within the framework of the securities laws and, thus, established a policy that contribution is, at least, consistent with observance and enforcement of the securities laws; whereas, the fact that Congress made no mention of contribution whatsoever in the antitrust laws and expressed no intent thereon in the legislative history of those laws (or in subsequent amendments thereto), although it expressly legislated contribution in the securities laws, suggests that contribution in cases arising under the antitrust laws was not intended—at least where contribution might predictably tend to frustrate observance and enforcement of the antitrust laws.

Olson Farms' reliance on *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968), in which the Supreme Court held that the doctrine of *in pari delicto* is not to be recognized as a defense to a private antitrust action for treble damages by one coconspirator against another coconspirator, is misplaced. There the Court said, *supra* at 139, 88 S.Ct. at 1984:

> [T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition.

There has been no linkage by the Supreme Court or by the Congress between "overrid-

8. Defendants-appellees, citing the reporter's transcript in *Cackling Acres, Inc. v. Olson Farms, Inc.*, *supra*, point out that the trial court instructed the jury that it could find Olson Farms liable as a conspirator only if it determined that Olson Farms intentionally entered into the conspiracy.

ing public policy in favor of competition" and a right of contribution by one coconspirator against another coconspirator; and, as discussed *infra*, the existence of such linkage is doubtful at best.

Olson Farms especially relies on the recent holding of the Eighth Circuit[9] that—

> contribution may be enforced against joint tortfeasors in an antitrust action. Because of the deterrent policy of the antitrust laws, even intentional tortfeasors may obtain contribution so that [other] tortfeasors will not escape liability.

Professional Beauty Supply, Inc. v. National Beauty Supply, Inc. v. La Maur, supra at 1186. In that case, National Beauty Supply, Inc. ("National") filed, with the district court's permission, a third-party complaint against La Maur for contribution to the extent of at least one-half of any recovery against it by Professional Beauty Supply, Inc. ("Professional"), for violation of either federal or state (Minnesota) antitrust laws.[10] National alleged that "La Maur solicited National to become a distributor of La Maur's products in the State of Minnesota," and that "National had no responsibility for, or control over, La Maur's decision to terminate Professional."[11] It also alleged that La Maur had a duty, which it failed to perform, to reveal to National the nature and extent of all business relationships between La Maur and others which might be unlawfully interfered with if National were granted an exclusive dealership. The district court granted La Maur's motion to dismiss National's third-party complaint for failure to state a claim upon which relief could be granted. Hence the appeal.

In reversing the district court, the two-judge majority stated its rationale as follows (594 F.2d at 1185–86):[12]

> There is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss for which two parties are responsible to be placed upon one alone because of the plaintiff's whim or spite, or his collusion with the other wrongdoer.

It further supported its holding with the following points:

> The presence of contribution provisions in the securities laws is some indication that, if the question were presented today, Congress would include a right to contribution as part of the antitrust laws.
>
> The trend among the states has been to allow contribution. A minimum of 23 states have enacted statutes which permit at least limited contribution, and 6 other states are generally cited as having case law which recognizes the right to contribution where there was no intentional misconduct.
>
> The fear that allowing contribution will interfere with the plaintiff's ability to maintain control of his lawsuit (a defendant may attempt to complicate the issues and confuse the jury by impleading numerous third-party defendants or fundamentally alter the lawsuit by impleading a third-party defendant with financial resources far superior to the plaintiff or the original defendant) is legitimate and serious, but "such problems can be

9. Three-judge panel consisting of Circuit Judges Heaney and Stephenson, and Senior District Judge Hanson, sitting by designation, who dissented.

10. Professional, a wholesaler of beauty supplies, alleged in its complaint that National, also a wholesaler of beauty supplies, demanded that La Maur, a manufacturer of beauty supplies, grant National an exclusive dealership for La Maur's products in Minnesota; and that, as a result of such demands, Professional was terminated as a La Maur dealer.

11. National renewed this argument before the Eighth Circuit, contending that, at most, it was secondarily liable to Professional.

12. We note that the statement is *almost* a quotation from W. Prosser, *Law of Torts* § 50 at 307. However, the statement omits Prosser's qualification that the parties be "equally, unintentionally responsible." *See* note 6, *supra*.

avoided by the district court's prudent use of its power to sever where necessary to insure justice." (Professional did not object to adding La Maur as a third-party defendant.)

A holding permitting contribution need not undermine the judicial policy in favor of settlement, and, in the proper case, the court should be able to fashion a rule of contribution which will protect the rights of settling defendants, citing *Zenith Radio Corp. v. Hazeltine Research, Inc., supra* [401 U.S.] at 348, [91 S.Ct. 795,] which held that a plaintiff could not recover for the same damages from each of two defendants. (The problem of how to treat a joint tortfeasor who has settled in good faith is not present in this case.)

District courts have the ability to sever issues and parties if the issue of contribution among defendants threatens to further complicate already enormously complex antitrust cases.

On balance, a rule allowing contribution is a greater deterrent then a rule that does not permit defendants to redistribute the cost of an antitrust action, thus enabling other joint tortfeasors to go "scot free." The possibility of escaping all liability might cause many to be more willing, rather than less willing, to engage in wrongful activity. Moreover, a rule allowing contribution would preclude a large or powerful tortfeasor from arranging with a plaintiff to exclude it as a defendant.

The majority opinion observed, 594 F.2d at 1186, that the decision of whether a particular party is entitled to contribution "is best left to the trier of fact upon consideration of all of the circumstances of a case, including the factors specified by Justice White in his concurring opinion in *Perma Life Mufflers, Inc. v. International Parts Corp., supra* [392 U.S. at 142, 88 S.Ct. 1981]." (Footnote omitted.) The factors (in the context of a treble damage suit by one coconspirator against another coconspirator) are: the relative responsibility for originating, negotiating, and implementing the scheme; who might reasonably have been expected to benefit from the illegal activity; whether one party attempted to terminate the arrangement and encountered resistance or countermeasures from the other party; who ultimately profited or suffered from the arrangemen...

The dissenting opinion by Judge Hanson well states the points against allowing contribution:

> The likelihood that a participant in a conspiracy to violate the antitrust laws may escape responsibility is at best a speculative concern (particularly in non-class actions) since, in any given case, there may be any number of other potential plaintiffs damaged by the particular restraint of trade or monopoly who will act against that participant.
>
> The question of deterrence "cuts both ways" (as the majority candidly observes), and it may well be that potential antitrust violators would be more likely to refrain from anticompetitive activities if they knew that any injured party could impose the full burden of treble damage recovery on any one of them even though he played only a relatively minor part in the conspiracy.
>
> The possibility of dissipating the impact of a treble damage award among antitrust coconspirators may actually encourage anticompetitive activity.
>
> A rule giving a right to contribution would present a substantial risk that antitrust laws will become more difficult for trial courts to manage. (*In re Corrugated Container Antitrust Litigation*, [84 F.R.D. 40], Memo Op., M.D.L. 310 (S.D. Tex. May 30, 1979.) The potential for confusion, delay, and complexity inherent in permitting antitrust defendants to implead other alleged violators (who may distort the litigation because of their size, nature of involvement, or position in the marketplace) would deter private plaintiffs of relatively limited means from bringing or maintaining a meritorious

suit. Although district courts have the power to superintend complex litigation, the multiplication of issues and parties must, nevertheless, be dealt with. The chilling effect on the incentive to bring or pursue a lawsuit is unlikely to be diminished by the mere possibility of the favorable uses of district court discretion. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977).

Thus, it can be seen that there are strong, offsetting arguments over the contribution issue. We regard as mere speculation the forecast that, if the question were presented, Congress would include a right to contribution as part of the antitrust laws.[13] It is noted that the Antitrust Improvements Act of 1976 (Pub.L.No.95-435, 90 Stat. 1383), which authorizes any attorney general of a State to bring a civil action in the name of the State, as *parens patriae* on behalf of natural persons residing in such State, requires the court to exclude from the amount of monetary relief awarded duplicative amounts awarded for the same injury. Such action falls far short of indicating a Congressional purpose to (1) provide for contribution in private antitrust suits, and (2) promulgate guidelines needed to implement such a policy covering such difficult matters as: the type of conduct for which rights of contribution will be allowed (negligent, intentional, criminal, and categories of violation); calculation of contribution shares (equal share, pro rata share, comparative liability, or comparative benefit); effect of settlements (whether to deduct only the amount of a settlement from the remaining damages to be collected from nonsettling defendants or the greater of such amount or what the defendant would have owed in contribution had he not settled); procedures for claiming contribution (cross-claims, counterclaims, separate actions, impleader—possibly as to defendants who have settled).[14]

[3] Before entering such a complex policy thicket, but recognizing a possible exception in the case of an unintentional violator,[15] we believe this court should await a clear signal, at least, from the legislative branch of our government on the matter. Certainly, the Congress, assisted by the resources of the executive branch, is in a far superior and more appropriate position to gauge the impact on observance and enforcement of the antitrust laws from contribution and its various facets of implementation. In this regard, we consider it salutary that the overwhelming majority of states in which a right of contribution exists among joint tortfeasors have provided for such a right by *statute*.[16]

Similar views were recently expressed by the Fifth Circuit in affirming the district court's dismissal of a third-party complaint (impleading alleged coconspirators and seeking contribution) of the defendant in a civil antitrust case. *Wilson P. Abraham*

13. One proposal has been introduced in the 96th Congress (1st Sess.)—S. 1468, the Antitrust Equal Enforcement Act of 1979. See testimony of Hon. John Shenefield, Asst. Atty. Gen. (Antitrust Div.), U.S. Dept. of Justice, relating to the proposed bill and to contribution in antitrust litigation. Subcommittee on Antitrust, Monopoly and Business Rights, Committee on the Judiciary, U.S. Senate, June 6, 1979.

14. Shenefield testimony, *id.*

15. In considering such an exception, the interests of judicial economy would seem to require that account be taken of whether or not the *unintentional violator* made a reasonable effort under Rules 13 or 14, Fed.R.Civ.P., to bring in the parties against whom contribution is sought and to have their respective liabilities determined. Even then, the trial court might well require evidence pertaining to factors such as those listed by Justice White in the *Perma Life Mufflers* case, *supra*. As with any general rule of law, exceptions may be squeezed out in the rare "ad absurdum" or "shock the conscience" type case, but not where contribution might predictably tend to frustrate observance and enforcement of the antitrust laws. *See Kline v. Coldwell, Bankers & Co.*, 508 F.2d 226, 234-35 (9th Cir. 1974), *cert. denied*, 421 U.S. 963, 95 S.Ct. 1950, 44 L.Ed.2d 449 (1975).

16. Shenefield testimony, *supra* note 12; W. Prosser, *Law of Torts*, *supra* at 308.

Construction Corp. v. Texas Industries, Inc., and *Texas Industries, Inc. v. Radcliff Materials et al.*, 604 F.2d 897 (5th Cir. 1979).

[4] In view of the foregoing, we hold that the district court correctly decided that Olson Farms' complaint did not state a cause of action based on a theory of contribution.

Indemnity

[5] Olson Farms' alternate demand for indemnity appears to confuse indemnity with contribution. Its amended complaint does not demand from defendants-appellees the *full* amount of the judgment paid by it—only "the amount of the judgment" attributable to the eggs bought by each of its alleged coconspirators;[17] whereas, unlike contribution, indemnity "enforces a duty on the primary or principal wrongdoer to respond for *all* the damages." (Emphasis added.) *Thomas v. Malco Refineries, Inc.*, 214 F.2d 884, 885 (10th Cir. 1954); *accord, United Air Lines v. Wiener*, 335 F.2d 379, 398 (9th Cir.), *cert. dismissed*, 379 U.S. 951, 85 S.Ct. 452, 13 L.Ed.2d 549 (1964). Moreover, as an intentional wrongdoer, Olson Farms is not eligible to recover indemnity. As this court said in *Security Insurance Co. of New Haven v. Johnson*, 276 F.2d 182, 185 (10th Cir. 1960):

> The general rule is that, in the absence of express contract, there is no contribution between joint tort-feasors. But where they are not *in pari delicto*, and their negligence is substantially different not merely in degree but in character, it is generally recognized that indemnity may be awarded.

Accord, United States v. Acord, 209 F.2d 709 (10th Cir.), *cert. denied*, 347 U.S. 975, 74 S.Ct. 786, 98 L.Ed. 1115 (1954). The rule was exemplified in *Thomas v. Malco Refineries, supra* at 886:

> In cases where the wrongful act or omission of a person causes injuries to another, and a second person, guilty only of imputed or constructive wrong, because of his legal relationship to the primary wrongdoer or his positive legal duty to the person injured, is also liable to the latter for the damages suffered, and such second person has discharged such liability, he is entitled to indemnity from the primary wrongdoer for the entire amount paid to discharge such liability. [Footnote omitted.]

In the context of a suit by a corporation against three of its employees for indemnity for criminal penalties and civil damages paid by it in an antitrust suit, this court said:

> The public policy against allowing a claim premised upon the wrongful conduct of the claimant is of ancient origin, akin to the "unclean hands doctrine" in equity. . . . Stated generally, the rule is that "where the plaintiff's conduct in connection with the transaction upon which his claim is based was illegal and criminal the courts will deny him relief." . . . [*Falconi v. F.D.I.C.*, 257 F.2d 287, 291 (3d Cir. 1958).] It is apparent that the principle can have no application in the case at bar. Here the criminal liability of the corporation is purely vicarious. It results solely from the activity of the corporate employees. To allow those employees to assert that their own unlawful conduct operates to defeat the right of their corporation to recover for the injury caused by that same conduct, is an exercise in circuitous reasoning. See Restatement (Second), Agency § 401, comment *d* (1958).

Wilshire Oil Co. of Texas v. Riffe, 409 F.2d 1277, 1283 (10th Cir. 1969).

[6] Olson Farms premises its claim for indemnity on a theory of unjust enrich-

17. Olson Farms argues that it is entitled "to be totally indemnified" with respect to its payment of claims of those plaintiffs who had not dealt with it. However, that is not the way the complaint reads; moreover, one who has violated the antitrust laws is liable to others besides those with whom he did business. *Walker Distributing Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1, 8 (9th Cir. 1963).

ment, arguing that if it is denied indemnity (or contribution) defendants-appellees will be allowed to retain benefits from their own alleged wrongdoing merely because Olson Farms was the only defendant in the *Cackling Acres* case. It quotes from *United Air Lines v. Wiener, supra*, that "The doctrinal basis for noncontractual indemnity among tort-feasors is unjust enrichment" and asserts that "the right to indemnity is restitutional in nature and is based on inherent injustice [*sic*]." The *United Air Lines* case arose out of a midair collision between a commercial airliner (42 passengers and crew of 5) owned and operated by United and an F–100 U.S. Air Force jet fighter carrying two Air Force pilots. There were no survivors. The appeal involved, *inter alia*, denial by the district court of indemnity to United from the Government in certain cases. In holding that United was entitled to indemnity, the parties *not* being *in pari delicto*, the Ninth Circuit, *supra* at 398, referred to—

> the general rule prevailing in the majority of American jurisdictions, said to derive from *Merryweather v. Nixon*, 8 Term.Rep. (Kings Bench 1799), that courts will refuse contribution or indemnity between concurrently negligent tortfeasors. [Footnote omitted.]

And it added, *supra* at 399:

> There is general agreement that indemnity is permitted where the indemnitee has only an imputed or vicarious liability because of a special relationship with the actual wrongdoer but is not personally at fault . . . .

Assuming the validity of Olson Farms' unjust enrichment theory, the *United Air Lines* case, nevertheless, makes no change in the rule that an intentional wrongdoer is not eligible to recover indemnity. That rule applies whether recovery is being sought under federal common law (*e. g.*, unjust enrichment) or state law (*e. g.*, fiduciary duty, as in the *Wilshire Oil Co.* case).

[7] Olson Farms has made no claim to a right of indemnity under the laws of the State of Utah, confining itself to a claim for contribution under Utah Code Ann. (1953) § 78–39 which the district court correctly rejected (*supra* note 5). We note that Utah Code Ann. (1953) § 78–27–41 preserves "Any right of indemnity which may exist under present law," but the only meaningful precedent we have found makes it clear that one guilty of contributory negligence is not entitled to indemnity from a joint tortfeasor. *Schneider v. Suhrmann*, 8 Utah 2d 35, 327 P.2d 822 (1958).[18]

In view of all the foregoing, the order of the district court dismissing Olson Farms' amended complaint is affirmed.

18. It is unnecessary to decide whether Utah state law on indemnity could apply, and we merely note that this is not a diversity suit (as was *Wilshire Oil Co.*), which would argue for applicability of federal common law on indemnity because of its impact on federal antitrust laws. *See* Paul, *Contribution and Indemnification among Antitrust Coconspirators Revisited*, 41 Fordham L.Rev. 67 (1972).

1. It should be noted at the outset that this matter is before the court on appeal from an

The CHAIRMAN. Thank you. Mr. Kohn, I believe you have suggested that S. 1300 will affect the pattern of settlements in antitrust suits. Could you describe in more detail the changes you foresee, based on your experience in negotiating settlements.

Mr. KOHN. Yes; I think as a practical matter, these gentlemen who are here testifying know it very well, the fact that there may be a greater liability, and you may have to pick up a part of somebody else's liability, has made people approach the settlement issue with common sense, so that you do get early settlement from those people who approach this thing rationally.

What you will have is a situation where hardliners will be able to keep other people in line. In the *Plywood* case, for example, that I handled, there were three of the major defendants, who represented 50 percent of the market, who decided that they were going to show plaintiffs that you could not get antitrust cases settled.

They were offered a settlement of some $20 million. They insisted upon trying the case and they wound up paying $165 million.

The reason they wound up paying that much is to some extent because they had to pay whatever damage was not obtained from the other defendants who settled early.

I think it had a very saluatory effect. I think it is a case which will encourage people to approach these essentially business problems rationally, and settle early on, when they get caught doing something that they knew from the very beginning they should not have been doing. So that to answer you in a sentence, I would say yes, this bill will have a very serious adverse effect on settlements, and that is why the hardliners are espousing it, because they want to make it difficult to settle cases, because that makes it difficult to bring cases, and that permits them to violate the antitrust laws with somewhat more impugnity than they now do.

The CHAIRMAN. Mr. Kohn, you are one of the ablest and most experienced lawyers in the whole country in antitrust matters. Do you really feel this bill would bring any injustice in antitrust suits? The purpose of it is to just let each one suffer his own liability; whereas, in the case he just cited, there was a 10 percent liability and the man had to pay the whole liability.

Mr. KOHN. Thank you for your initial remarks. You have been through more introductions than I. I think the appropriate answer to the first part of your comments is that my father would be glad to hear what you said and my mother would actually believe it. But setting aside the reference to me and my abilities, I do think that if you get back to common sense on this, the reason why we are all here today is because the present law promotes strong, private antitrust enforcement.

The Attorney General, in every administration, Republican and Democratic, from Bill Rogers right down to the present day, has said that private enforcement is the linchpin of getting real enforcement of the antitrust laws, particularly in price fixing, and therefore, anything which militates against private enforcement will strengthen the opponents of antitrust laws, will weaken our competitive economy, will increase prices, will bring inflation, will do all of the things that are adverse.

So that I really do very strongly oppose this for that reason. It will seriously impede private antitrust enforcement and that is why they want it, and that is why I do not want it.

The CHAIRMAN. Judge Griffin Bell who just testified was a former Attorney General, too, and you see the position he has taken.

Mr. KOHN. I say look to the position he took when he was Attorney General, not the position he takes today.

The CHAIRMAN. Well, sometimes wise men change their minds.

Mr. KOHN. They certainly do. I think the inquiry, though, as it is in every court of law, is why they change their minds and on whose behalf their mind is being changed.

Judge BELL. Mr. Chairman, I understand I have been quoted as having favored, taken a position different from the position I am taking now in some testimony. I have not seen it. Mr. Shenenfield took the position that he was against the prosecution's bill when I was Attorney General. I took the position I was in favor of it at the same time, so I do not know where this is coming from.

Mr. KOHN. Well, Mr. Shenenfield purported to appear on behalf of the Justice Department and the Attorney General. I do not recall any testimony by Attorney General Bell in those hearings in 1979.

The CHAIRMAN. All right. I think those are all the questions I have. Thank you, ladies and gentlemen, for appearing.

Our last panel is William Crawford, general counsel, Dart & Kraft, Inc., Northbrook, IL, on behalf of the Business Round Table; Joseph R. Creighton, vice president-general counsel, Harris Corp., Melbourne, FL, on behalf of the Chamber of Commerce of the United States of America; Thomas R. Long, vice president and general counsel, Westvaco, New York, NY, on behalf of the National Association of Manufacturers.

Now who wants to go first? And when you talk, please give your name for the record.

STATEMENT OF A PANEL CONSISTING OF WILLIAM CRAWFORD, GENERAL COUNSEL, DART & KRAFT, INC., NORTHBROOK, IL, ON BEHALF OF THE BUSINESS ROUNDTABLE; JOSEPH R. CREIGHTON, VICE PRESIDENT-GENERAL COUNSEL, HARRIS CORP., MELBOURNE, FL, ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; THOMAS R. LONG, VICE PRESIDENT AND GENERAL COUNSEL, WESTVACO, NEW YORK, NY, ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. CRAWFORD. I will go first, Mr. Chairman. My name is William Crawford and I am senior vice president and general counsel of Dart & Kraft, Inc., and as you say, I am testifying on behalf of the Business Roundtable, which as I am sure you know, is an organization which consists of about 200 chief executive officers of major American companies.

With me is Thomas Leary, sitting behind me, of the Hogan and Hartson firm, who is counsel to the Round Table in this matter and in other antitrust matters.

We have submitted a statement of our position for the record but with the committee's permission, after this preceding discussion, I would just like to summarize our position orally and briefly, and to the point. The Roundtable supports——

The CHAIRMAN. If you would summarize your position, I would like all of you to do that because time is running on, and if you have statements we can put them in the record, if you would care to. Now you may proceed.

Mr. CRAWFORD. All right, sir. Thank you. Just to the point, the Round Table supports S. 1300. As you have pointed out in your introductory statement, which to me is pointed, succinct, and to my mind dispositive, the principle of joint and several liability when interjected into antitrust cases does impose and can impose, and will impose, intolerable settlement pressures on defendants, defendants who may be entirely innocent but simply unable, as Judge Bell put it, to bet your company, to take the risk of incurring three times the liability for all the damages of all the defendants in the case.

The statement is startling to me, that this simply is fairness to hardcore price fixers. The problem is that many who are accused are not price fixers at all but they are entitled to fairness like anyone else, and under this present state of the law they do not receive it.

The problem is not new. In recent years, there has been a strong bipartisan consensus, certainly among us, that something must be done about the problem.

There were controversies over the earlier proposals. We have all learned from that experience. We went back. We studied hard. We analyzed it. We believe that S. 1300 addresses the problem of unfair, "whipsaw" settlement tactics in a straightforward and balanced way. It avoids all of the complications that people were concerned about in the earlier proposals; it will not affect pending antitrust cases. It will not complicate antitrust litigation with controversies over who owes what to whom, and at the same time, it will ensure that a plaintiff can recover full treble damages in the event that a proportionate share cannot be recovered from a particular defendant.

The Business Roundtable supports strong enforcement of the antitrust laws. Roundtable members have been, are, probably will continue to be, plaintiffs in antitrust cases as well as defendants, and all of our members want to operate in an open, freely competitive marketplace.

We think S. 1300 will promote and not inhibit strong antitrust enforcement. It increases the likelihood that a wrongdoer will be held individually accountable for the damage it has caused. In short, a long and widely recognized inequity has a good remedy at hand.

We urge it, we support it, and we thank the committee for the opportunity to appear before it. I would be happy to answer any questions.

[The following statement was submitted for the record:]

STATEMENT OF THE BUSINESS ROUNDTABLE
IN SUPPORT OF S. 1300

My name is William Crawford and I am Vice President and General Counsel of Dart & Kraft, Inc. in North Brook, Illinois. I am also chairman of the Business Roundtable's Lawyers' Advisory Committee on antitrust matters and in that capacity I appear today to express the Roundtable's support for S. 1300, a bill to provide for individual treble damage .. liability in antitrust suits.

The Business Roundtable is an association of about 200 chief executive officers of substantial companies that are widely dispersed by geographic location and by category of business. The Roundtable was founded in 1972 in the belief that business executives should take an active role in the continuing debates about public policy.

The Roundtable believes that the basic interests of business are consistent with the interests of the American people, who are closely involved with business as consumers, employees, investors and suppliers. In recent years, particularly, substantial businesses have been plaintiffs as well as defendants in antitrust actions. Companies who comply with the law want their competitors and their suppliers to do likewise. Like any other American citizen, therefore, business leaders have an interest in supporting an antitrust enforcement policy that is both effective and fair.

S. 1300 is designed to meet both objectives. As Senator Thurmond pointed out in his introductory statement:

> "This measure would eliminate the unfair and inequitable whipsaw effect of joint and several liability in antitrust suits that often permits the largest defendants to settle out of litigation early and inexpensively, leaving the remaining smaller defendants fearing liability for three times the total injury caused by the conduct of all of the defendants."

At the same time, this bill would not diminish any plaintiff's potential recovery because it provides in Sec. 4I(b) that defendants may be jointly and severally liable for those damages that cannot be collected because they are attributable to other defendants who are either beyond the jurisdiction of the U.S. courts or financially unable to respond. It is therefore a balanced bill which is fair to both sides.

The basic problem of fairness which this bill seeks to address is not unfamiliar. Three years ago, this Committee reported out S. 995, the Antitrust Equal Enforcement Act, with strong bipartisan support. S. 995 retained the principle of joint and several liability, but provided that non-settling codefendants could be sued for their fair share of damages and that the damages attributable to settling codefendants would be "carved out" of the potential judgment against the remaining defendants. S. 995 ultimately failed to pass, but the most intense controversy over the bill had nothing to do with its basic justification or its fundamental fairness.

Unlike S. 995, this bill will not arouse controversy over effective dates, and it will not complicate litigation. S. 1300 applies only to actions "commenced . . . after the date of enactment," so it will have no impact at all on pending cases. Moreover, unlike S. 995, the bill does not raise the spectre of additional lawsuits in which defendants assert claims against one another.

S. 1300 then represents a considerable improvement over S. 995. S. 1300 is supported by precisely the same concerns which prompted the earlier bill and it addresses the major shortcomings of that bill. The intervening three years have provided an opportunity for further study and development of a vastly improved remedy.

The Roundtable is an organization which includes sometime antitrust plaintiffs. As such, we do not believe that

any antitrust plaintiff can claim that this bill is unfair. It may make it more difficult for antitrust plaintiffs to use a settlement tactic that was questionable in the first place, but no plaintiff will be deprived of an opportunity to recover full treble damages.

We will not burden the record with a repetitious description of the serious problem which even an innocent antitrust defendant can face if plaintiff's counsel embarks on a strategy of settling early and cheap with some defendants and relying on the overwhelming pressures of joint and several liability to exact large settlements from the others, irrespective of culpability. The problem has been adequately described in the hearings on S. 995 and in the testimony of other witnesses today. It might be useful, however, to respond briefly to some of the objections to remedial legislation which have been raised, and which are likely to be raised again.

Some may argue that the bill will have an adverse impact on the ability of private actions to deter antitrust violations. This argument simply proves too much. It has force only if you adopt the view that any tactical advantage for antitrust plaintiffs, whether it be fair or unfair, is justified in the name of deterrence. But, if "whipsawing" tactics by plaintiffs are unfair, as most people would concede, they are not justified by the fact that they may permit plaintiffs to extort more money and thereby scare potential violators. Moreover, if the plaintiff's unfair bargaining advantage is set aside, as it should be, it is not clear at all that joint and several liability enhances deterrence. S. 1300 assures that defendants will be held individually accountable for their own conduct, and that they cannot escape responsibility just because plaintiffs choose to collect from someone else. It is well recognized that certainty of punishment is a key element in promoting deterrence.

It may further be claimed that antitrust offenses are like "intentional" torts and hence that it is particularly inappropriate to remove the potentially draconian sanction of joint and several liability in this class of cases. Again, the argument loses its force when the facts are examined. In virtually all cases, the shareholders who actually bear the burden of antitrust treble damages did not participate in, or even know about, the conduct which gave rise to the claim. Therefore, there is no justification for treating them like intentional tortfeasors. (Similarly, there is no reason to fear that a bill which applies only to antitrust actions, as S. 1300 does, will have an undesirable spillover effect in other areas whose joint and several liability may be entirely appropriate.) The people who have actually engaged in conduct prohibited by the antitrust laws are, of course, typically not sued for damages as individuals, but they can be criminally accountable.

Finally, some may argue that a standard which makes defendants accountable for damages in proportion to their actual purchases or sales does not discriminate between defendants who may be the actual ringleaders of a conspiracy and defendants who may merely acquiesce passively in the schemes of others. There are a number of answers to this argument. In the first place, not everyone would agree that purely passive participation is necessarily less culpable than more active involvement. Second, any attempt to distinguish between various levels of culpability in assessing damages would immensely complicate litigation. Finally, existing law does not distinguish between defendants' degrees of culpability either. A passive conspirator and an active conspirator are equally liable for damages today, as they would be under S. 1300. Under present law, however, there is a far greater risk that the passive defendant will have to pay damages on

account of someone else's sales. Indeed, the availability of "whipsawing" settlement techniques today creates a real risk that an entirely innocent defendant will have to pay substantial sums in settlement because the litigation stakes are so high.

In conclusion, we believe that S. 1300 is a fair bill, which addresses a serious problem in an evenhanded way. It is clean cut and uncomplicated. The arguments against it cannot withstand close scrutiny. The Business Roundtable therefore supports the bill.

The CHAIRMAN. We might hear these others first before we ask questions. Now who wants to speak next?

STATEMENT OF JOSEPH R. CREIGHTON

Mr. CREIGHTON. My name is Joseph Creighton. I am representing the U.S. Chamber of Commerce. I am vice president-senior legal advisor of Harris Corp.

I recently was retired, or something, from the position of general counsel and the record should show that.

We have filed a statement and I would like to make some comments, based, to a great extent on what we have heard this morning. I think our statement covers our position very well.

I am concerned about this dicussion of deterrence. Deterrence is a public policy to deter law violation, not to deter anything you do in business. You must determine fairness as well, and you talk about fairness before you get around to deterrence.

When you talk about deterrence, you are assuming that people are either guilty or that they want to be guilty, and they comply with the law because—the only reason they comply with the law is because of fear of being found guilty, and that simply is not the case.

I represent a company who I think Mr. Kohn would call irrational because we do not like to settle cases when we think we are not guilty. Unfortunately, we do settle cases and we settle them usually on the advice of trial counsel, usually because of the high costs of trial, and usually because there is a risk of losing.

I would point out that we in business who advise corporations, general counsel and corporate legal departments, are the people who would be applying deterrence, not Mr. Kohn, not the trial lawyers, not the professors.

We are the people who discuss something with management before it occurs. That is when deterrence applies. The current law has plenty of deterrence now. S. 1300 applies only after your case has started, and only after you then have to advise your management as to whether to settle or not, or whether to go to trial.

And there you appraise both the costs of the litigation and the risk of losing. Now, we have had several antitrust cases against us. We have never lost one. We have settled a couple.

We had a case against us recently for $500 million in damages. We chose to fight it. We filed a summary judgment and we won in the southern district of New York, but it cost us $150,000 just to defend. That cost is deterrence. We would have settled that case for $50,000 any time down the line.

Now people are not guilty just because they are charged. In the first place, the standard is preponderance of the evidence, not a guilty standard, that you are faced with. Conspiracies are based upon circumstantial evidence where the fact of the conspiracy is not itself clear in many cases, and where the participance of, if you will, the fringe companies, is not at all clear.

They are faced with being in an industry with big companies where, in essence, the prices are determined by somebody else.

If they go along with those prices they may be subjected, they will certainly be subjected to the charge, and they could be found to have been a coconspirator.

In that environment, the only thing that the current law does is give the plaintiffs a chance to try to get more than three times the total damages, which is possible through settlement whipsaw.

So, we would think that based upon the real facts in life, as Mr. Kohn referred to so often, that the real facts say that this law is fair and it is needed, and the U.S. Chamber thanks you for your support, and we are supporting it.

[Statement follows:]

58-293 O - 86 - 5

STATEMENT
ON
ANTITRUST REFORM (S. 1300)
before the
SENATE JUDICIARY COMMITTEE
for the
CHAMBER OF COMMERCE OF THE UNITED STATES
by
Joseph R. Creighton

Mr. Chairman and members of the Committee, my name is Joseph R. Creighton and I am Vice President-General Counsel for Harris Corporation. I am testifying today on behalf of the U.S. Chamber of Commerce, the world's largest business federation of companies, trade and professional associations, and state and local chambers of commerce. The Chamber strongly supports S. 1300 and appreciates being given the opportunity to share its views on this important antitrust reform legislation.

The serious unfairness and potential for abuse inherent in current antitrust damage law have been a subject of concern to the business community and the Congress for several years. Under the present system, in a price-fixing case each defendant, regardless of its size or relative culpability, is potentially liable for three times the damages attributable not only to its own sales but also for three times the damages attributable to the sales of all alleged coconspirators. In the context of extremely liberal damages standards and multi-district class actions, which are common in private antitrust actions, such damage exposure can be staggering.

Moreover, this combination of joint and several liability and mandatory trebling creates a tremendous potential for abuse by antitrust claimants. Enormous, open-ended liability may drive even innocent defendants into settlement; for once some defendants have settled for substantially less than their fair share, the remaining defendants are still liable for three times the damages caused by the settling defendants, less only the settlement amount.

Consequently, as more defendants settle, the pressure on the non-settling defendants escalates: because the potential liability of non-settling defendants is so great, these defendants--regardless of their innocence or culpability--are whipsawed into paying huge sums of money in order to avoid being subjected to the risk of trial. The unfairness of this tactic is particularly apparent in the context of

small businesses where, for example, an innocent small firm may be forced to pay millions of dollars in order to preserve its credit and avoid potential multi-billion dollar liability.[1/]

Although contribution and claim reduction have been propounded in the past as a solution to these problems, the substantial disagreement that surrounded the issue of whether such legislation should apply to pending cases proved an insurmountable obstacle to its passage.

Until now, therefore, the problems of combining joint and several liability with mandatory treble damages have lacked a solution which the entire business community could support. Recognizing this, the U.S. Chamber, joining other members of the business and legal communities, has been engaged in efforts to agree upon the best approach to reform. S. 1300 represents the culmination of those efforts.

This important legislation presents a simple and effective solution to the abuses of antitrust remedies that have plagued U.S. business. Further, the bill does not deny recovery to victims of antitrust violations. The bill has been received enthusiastically by small and large businesses alike. Indeed, small firms, which constitute more than 90 percent of the Chamber's membership, particularly would benefit from S. 1300, since this bill would preclude large firms with big market shares from settling for less than their fair share of damages.

Under the provisions of S. 1300, each antitrust defendant's liability in horizontal price-fixing and similar cases is limited to three times the damages which its own sales or purchases have caused. Thus, by modifying the doctrine of joint and several liability in these cases, S. 1300 enables a defendant to litigate or settle based on an evaluation of the merits of this own case. The bill prevents plaintiffs from threatening innocent companies with industry-wide treble damage liability and eliminates the possibility of plaintiffs engaging in whipsaw settlement tactics whereby plaintiffs settle cheaply with some defendants and then exert pressure on the remaining defendants to settle at a higher rate so that they will not be left solely liable for all remaining damages. Moreover, the legislation protects the rights of plaintiffs to be compensated by continuing joint and several liability

---

1/ For example, see the statement of George Kress, Chairman of the Board, Green Bay Packaging, Inc. before the Committee on the Judiciary, United States Senate, 97th Cong., 1st. and 2nd. Sess. (1981-1982).

when a coconspirator is beyond the jurisdiction of the United States or financially incapable of satisfying a judgment against it.

Additionally, S. 1300 achieves all of these objectives while also increasing the deterrent effect of the treble damage suit. It eliminates the ability of an antitrust violator to settle without paying its fair share of damages, and it encourages plaintiffs to seek redress form all culpable parties, thus minimizing the likelihood that some violators will escape being sued.

S. 1300 also places U.S. companies on a more equal footing with their foreign competitors. The combination of treble damages with joint and several liability is unique to the United States; consequently, domestic firms which may be forced into paying huge antitrust settlements regardless of their innocence or guilt are at a disadvantage against foreign firms--none of whom is subject to private antitrust suits in its home market.

In conclusion, the U.S. Chamber strongly supports S. 1300, legislation which represents the best effort of many in the business and legal communities. It is an extremely important antitrust reform measure which deserves prompt consideration by Congress.

The CHAIRMAN. Thank you, Mr. Creighton.
Mr. Long, do you want to make your statement now?

STATEMENT OF THOMAS R. LONG

Mr. LONG. Thank you, Mr. Chairman, and members of the committee. I am Thomas R. Long, vice president and general counsel of Westvaco Corp.

I can assure you that Westvaco supports S. 1300 but I am here today testifying as a member and on behalf of the National Association of Manufacturers.

As you know, the NAM consists of large companies, small companies, its membership is located in every State in the union. Its membership consists of companies that have been plaintiffs as well as defendants in antitrust matters.

We appreciate the opportunity to come here this morning and express strong support for S. 1300. The many inequities and abuses inherent in the present system have been well documented before this committee in prior hearings and this morning.

We all know that the rule of joint and several liability in antitrust cases which was established by the courts and not by Congress makes one defendant responsible for the total judgment, whether that judgment is applicable to settling defendants or violators that were not sued.

This system generates very substantial pressures. I take great issue with statements made by Mr. Kohn that innocent companies have not had to pay, or that companies have not had to pay a disproportionate share of damages. If he would read the *Olson Farms* decision, that is a case where a defendant with 10 percent of the market was the only defendant sued, and ended up paying damages for 100 percent of the market.

Based on personal experience, I can tell you that innocent companies have been forced to settle.

We all know, based on the history of the *Corrugated* cases, the *Plywood* cases, that the economic health of firms has been threatened by the prospects of paying runious judgments attributable to damages that were caused by others.

The private treble damage remedy was enacted to inflict additional punishment on wrongdoers, but under the current system, through sweetheart settlements, those wrongdoers many times get away.

The private treble damage remedy has become a game. It has its own language. Plaintiffs' lawyers cast their nets wide, or narrowly, depending on tactical reasons. In an attempt to break the ranks of defendants who wish to defend themselves and squeeze out settlements, sweetheart deals are made. Tactics of divide and conquer, whipsawing are employed. The weapon used is not hard evidence but it is the rule of joint and several liability, which admonishes every defendant not to be the last man in the canoe, not to be left holding the bag, not to bet your company, but run for cover by settling out, regardless of the merits.

I think that S. 1300 provides a simple workable solution. It has been narrowly drawn, is prospective only, and the interests of plaintiffs are fully protected. We think that S. 1300 will strengthen deterrence. It will ensure that all wrongdoers will be punished.

It will enable companies to compete more effectively at home and abroad by assuring that the commercial health of these companies will not be threatened by ruinous judgments.

The business community is united, unlike prior years. The only opposition I am aware of are from those who have profited from the present system.

As was mentioned earlier, we have sought out in the business community folks that might be opposed to this bill. We have found none.

I would like to make a couple of comments about statements made by Mr. Brockmeyer. He mentioned the *Toyota* case. This involves a distributor and a dealer. It is a vertical case. It is not covered by S. 1300. He talked about bid rigging. If you think about it, under S. 1300, the winning bidder would be required to pay all of the damages. Therefore, I think that deterrence would be increased.

S. 1300 is a long awaited consensus solution to a very serious problem. In view of the broad-based support and need for this legislation, we urge the committee to mark this bill up and report it out at a very early date. Thank you very much.

[Statement follows:]

PREPARED STATEMENT OF THOMAS R. LONG, ESQ.

ON BEHALF OF THE
NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. Chairman, members of the Committee, I am Thomas R. Long, Vice President and General Counsel of Westvaco Corporation. Although I can assure you that Westvaco Corporation strongly supports S. 1300, I am testifying this morning as a member of and on behalf of the National Association of Manufacturers (NAM).

The National Association of Manufacturers is a voluntary business association of over 13,000 corporations, large and small, located in every state. Members range in size from the very large to over 9,000 smaller manufacturing firms, each with an employee base of less than 500. NAM member companies employ approximately 85 percent of all workers in manufacturing and produce over 80 percent of the nation's manufactured goods. The NAM is affiliated with an additional 158,000 businesses through its Associations Council and the National Industrial Council.

The NAM appreciates this opportunity to appear before the Committee today to express its strong support for S. 1300. The present system for litigating private antitrust cases results in asserting enormous pressure on defendants and is unfair. Mandatory treble damages, class actions, a virtually unlimited statute of limitations because of the concept of fraudulent concealment, and allowing soft evidence of conspiracy and damages to be considered by a jury all combine to cause a great risk that defendants, even an innocent defendant, may be found liable for extraordinary amounts of damages. The possible amount of damages and risk are compounded by the application of the rule of joint and several liability. This rule makes one defendant responsible for the total judgment, including damages attributable to settling defendants. Plaintiffs' lawyers use the pressure generated by this system to force companies to settle without

consideration of the merits. By holding out the prospect of a life-threatening judgment, plaintiffs' lawyers are able to play one defendant off against another. Wrong doers may escape liability by settling early and cheap. Innocent and small companies may be forced to pay disproportionately large amounts. Innocent companies may be forced to pay substantial settlements rather than defend themselves. In the Corrugated and Plywood litigation a few years ago we saw the economic health of firms threatened by the prospect of having to pay ruinous judgments attributable to the damages caused by others.

S. 1300 would eliminate the serious injustice caused by the application of joint and several liability. The simple solution provided by S. 1300 is to make each defendant in a horizontal price fixing or similar case individually responsible for the treble damages it caused. Culpable defendants would be held fully accountable by being required to pay a fair share of the treble damages. Innocent firms could no longer be coerced into unfair settlements by the threat of being held liable for a disproportionately large amount of the treble damages. Allocation of antitrust liability would no longer depend on the whims of plaintiffs' lawyers.

As the NAM has pointed out in connection with its past support of contribution and claim reduction legislation, antitrust remedies reform is needed to stop the abuses caused by the existing rule which holds each defendant in an antitrust case, regardless of its market share, size, or relative culpability, potentially liable for three times the total damages assessed.

The several inequities and abuses inherent in the current antitrust remedies system have been well-documented in prior hearings before this Committee in prior Congresses. Because antitrust damage shares may be arbitrarily manipulated by plaintiffs without regard to culpability, defendants with small

market shares and culpability have often been coerced into paying exorbitant settlements, while larger and more culpable defendants have sometimes paid much less or nothing at all. Moreover, the threat of massive liability has been used to whipsaw unjust settlements from even innocent companies and to threaten the continued financial viability of otherwise healthy firms. These arbitrary and patently unfair results were never intended by Congress.

Although the NAM has supported contribution and claim reduction legislation, there has been a disagreement within the business community over whether such legislation would provide the best approach for solving the joint and several liability problem in antitrust cases and its effective date. Now, finally, a new consensus proposal has been developed which the entire business community and Congress can support. The NAM, along with other concerned business groups, joins in endorsing S. 1300 as the best approach for eradicating the inequities caused by the combination of joint and several liability and mandatory treble damages. It alleviates the unfairness of the current system with less complexity and litigation costs than contribution legislation. It is applicable only to suits commenced after the date of its enactment. It has broad-based support in the business community and we are not aware of opposition.

The NAM believes that S. 1300 would also help strengthen the deterrence of antitrust violations. All antitrust violators will be held fully accountable. Plaintiffs' lawyers will no longer be able to make sweetheart settlements with culpable defendants. By preventing plaintiffs from recovering damages attributable to the purchases or sales of companies which it chooses not to sue, S. 1300 would significantly increase the likelihood that all antitrust violators would be named as defendants and required to pay their full share of treble damages. The possibility of a violator escaping liability would thus be significantly reduced.

The interests of plaintiffs are fully protected under S. 1300. The treble damages attributable to antitrust violators outside the jurisdiction or financially unable to pay would be collectable from other defendants.

It should be noted that the United States is the only country in the world in which mandatory treble damages is combined with joint and several liability in private antitrust cases. Under the present system the economic health of American firms is threatened and their ability to compete abroad is undermined.

In sum, S. 1300 is a long-awaited consensus solution to the antitrust remedies problems which Congress has been grappling with for the past several years. The NAM strongly endorses this legislation and stands ready to assist this Committee and Congress in any way that it can to support the bill's enactment.

In view of the broad-based support and need for this legislation, we urge the Committee to mark up and report out S. 1300 at an early date.

Thank you.

The CHAIRMAN. Thank you, Mr. Long.

Senator METZENBAUM. Mr. Chairman.

The CHAIRMAN. Senator, I have got to go to the Senate. Let me ask a few questions and I will turn it over to you.

Senator METZENBAUM. Mr. Chairman, I left another committee in order to——

The CHAIRMAN. I understand, but I have another meeting, too, but I have to choose where I go.

Senator METZENBAUM. Well, Mr. Chairman, then let me just say publicly that I am strongly opposed to this bill and will make every possible effort to defeat it. I think it is bad legislation. I think the Senate has other priority issues and should not waste its time on this. I will submit the balance of my statement for the record.

The CHAIRMAN. All right, sir. And if you have any questions you are welcome to ask them as soon as I get through.

[Statement of Senator Metzenbaum follows:]

OPENING STATEMENT OF SENATOR HOWARD METZENBAUM

Mr. Chairman, today we hold what I hope will be only the beginning of very careful consideration by this committee of S. 1300, which would abolish joint and several liability for price fixing conspiracies.

When this idea began to surface early this year, some of us were informally told that the supporters of this bill might not pursue it if there was to be vigorous oppo-

sition. I can assure them that if this is still their policy, we can pack up and go home. I am strongly opposed to this bill.

This legislation is worse for competition and consumers than the contribution legislation this committee reported 3 years ago. This bill will remove the powerful deterrent of joint and several liability, which has been employed against intentional tortfeasors since early English common law. This bill will benefit the most insidious type of antitrust violators—competitors who join together to fix prices.

Four years ago, Griffin Bell testified in support of the contribution bill. He stated, "leave treble damages and leave joint liability. Nobody I have heard is suggesting we stop that. Then you have ample deterrent."

Now, he is asking to abolish joint liability for hard core price fixers and require them to only pay for damages caused by their own sales. A businessperson who is asked, or pressured, to join in a price fixing cartel would no longer risk liability for damages suffered by the entire conspiracy. A firm with a small share of the market will realize that in going along with secret price fixing, its risks are few. A large firm will know that it will profit greatly from the cartel but its liability will be limited. Deterrence will clearly be reduced.

In addition, S. 1300 makes it much harder for victims of price-fixing—the consumers—the small business persons—to prevail in court. The bill will make class action litigation on behalf of consumers more difficult. This is because each plaintiff could only recover from those defendants from whom it made purchases, rather than collecting from a pool of money owed by all defendants jointly. In addition, it will increase the litigative burdens imposed on consumer plaintiffs by requiring them to establish the damages attributable to each defendants sale of goods or services. Right now, a plaintiff in a per se illegal price fixing case has no such burden.

Why is this bill being so strongly advocated? We hear that the current system forces innocent defendants to pay enormous claims because of whipsaw tactics by plaintiffs' attorneys who settle cheaply with major wrongdoers and then put the squeeze on the poor little guy. Unfortunately for the proponents, there is still no evidence that this practice occurs in most or even many cases. Indeed, it defies common sense to think that plaintiffs would let a wealthy corporation off the hook and risk going to a jury against a small fry defendant in the overall conspiracy.

Why do the major business groups support this bill? They're not fools—they realize that this is just the stalking horse for more to come. If whipsaw tactics are wrong in antitrust cases, they are wrong in product liability cases. If joint liability is unfair to a defendant with a small market share in a price fixing case, it is unfair to a toxic polluter in a Superfund case with a small share.

We will hear a lot of talk today about fairness. As I noted above, I am still waiting for persuasive evidence that the current system results in substantial unfairness in many or most cases.

Mr. Chairman, this is before the Congress because the Supreme Court several years ago refused to create a right of contribution.

In so holding, the court noted the historic intent of the Sherman Act to punish past and deter future wrongful conduct, "not to ameliorate the liability of wrongdoers. The absence of any reference in the legislative history or of any possibility that Congress was concerned with softening the blow on joint tortfeasors in this setting makes examination of other factors unnecessary."

Our predecessors in Congress had it right, Mr. Chairman. We should be concerned with the small businesses and consumers who are victims of price fixing. They only have the Government to turn to for redress, through the Justice Department's prosecutions or the court's civil damages remedies.

Concern, as the Supreme Court said, for softening the blow to proven price fixers merits far, far less concern. In this regard, I am in the rare position of being in total agreement with two leading exponents of the Chicago School of Antitrust, Judges Posner and Easterbrook. As the Supreme Court wrote in 1980, if price fixers want to avoid unfair settlements or disproportionate judgments, their task is easy: they can simply obey the law.

The CHAIRMAN. Now gentlemen, your organizations consist of companies that might be either plaintiffs or defendants in antitrust suits.

Is the business community support for this bill affected by the likelihood that defendants might find it more difficult to settle out of court inexpensively and early? We will ask each one of you that. We will start with you, Mr. Crawford.

Mr. CRAWFORD. I think the business community is affected by the likelihood that it will do away with the inequity and the whipsawing and will decrease the opportunity for hard core price fixers to settle out earlier and cheap, leaving innocent defendants faced with liability that may put them out of business.

The CHAIRMAN. We will hear from you, Mr. Creighton.

Mr. CREIGHTON. Well, we are supporting this legislation primarily because we think that if we ever got dragged in we would be innocent, at least we hope we would be, and so we do not think we would want to be whipsawed.

We are just as likely to be a plaintiff as a defendant in today's world, I think, but I do not think it hurts us as a plaintiff because this bill does not reduce the total amount of damages available to a plaintiff.

The CHAIRMAN. Now we will hear from Mr. Long.

Mr. LONG. Mr. Chairman, the law should be fair. The present law is not fair, and this bill will bring back an element of fairness at no expense, in my judgment, to the plaintiffs, and no expense with respect to deterrence. Deterrence, if anything, will be enhanced by assuring that all wrongdoers pay their fair share.

The CHAIRMAN. Now the next question, and if it is going to take some time, you can answer for the record because I have to leave here in about 2 minutes. Or if it is brief, you can answer them now.

Could you give us your view as to the fairness of this bill as opposed to joint and several antitrust damages. Mr. Crawford.

Mr. CRAWFORD. I think it is completely fair, Senator, and I think it removes an element of unfairness that has long been in the law and long been recognized.

I think there has been considerable testimony as to the whipsaw effect, and it is very real, and it is one of the things which forces people who are innocent defendants, and those people who are in gray areas, to settle out, where they might normally wish to go in and take advantage of our system and prove their innocence.

The CHAIRMAN. Mr. Creighton.

Mr. CREIGHTON. I do not believe either the U.S. Chamber or our company would support it if we did not think it was fair. The Chamber, you know, represents many large and small organizations.

The CHAIRMAN. Mr. Long.

Mr. LONG. With respect to damages, I think that this bill should have little or no overall effect. If the plaintiff has got a case and can prove there are damages, those damages will be collectable.

It is the case where the plaintiffs have been getting paid from innocent companies, and companies in the gray area that may suffer, but plaintiffs will be forced to do their homework a little better, and where a company is guilty, and they have got the facts and got the evidence, those people will continue to pay.

The CHAIRMAN. Now my next question is, in your view will this bill reduce the deterrent effect on companies that might consider engaging in antitrust violations? Mr. Crawford.

Mr. CRAWFORD. Despite testimony obviously on both sides, it is my view, based on not only common sense, but also experience, that it will increase the deterrent effect, and this is because it will hold the individual wrongdoer liable for what he did, and it will

decrease his opportunity to settle early and cheap because it will decrease the plaintiff's attorney's willingness to let him out early and cheap. So I think it will have a deterrent effect.

The CHAIRMAN. Mr. Creighton.

Mr. CREIGHTON. As I have already stated, I do not think it reduces the deterrent effect at all. I agree, it probably increases it. It increasese it probably for the wrongdoers.

The CHAIRMAN. Mr. Long.

Mr. LONG. Based on my experience over the years, and I might say that I have responsibility for antitrust compliance programs in my company, I would think that deterrence would be enhanced.

Any time that you can ensure that wrongdoers are going to pay, rather than engage in a foot race to the plaintiff's lawyer's office to settle, I think you increase the likelihood of deterrence.

The CHAIRMAN. I have one more question here and you can all answer for the record. Could you describe the nature of any dissent or doubt regarding this bill expressed by your members. You all just answer all that for the record, and I have got to go. I have to open the Senate. You will have to excuse me.

Mr. CRAWFORD. Thank you very much, Senator. For the record, the only dissent or doubt that we had was how best to remedy the inequity, never to leave it unremedied. The question was whether it should be contribution, claim reduction, or joint and several, and we are now all clear that joint and several is the best remedy. There is no dissent on this.

Mr. STARLING. Mr. Creighton.

Mr. CREIGHTON. The U.S. Chamber is a huge organization and I have no personal knowledge of every possible expression of opinion on this.

I have not heard any dissent, and I agree with Mr. Crawford. Our discussion has been about how to remedy the problem, and which were the best alternatives.

Mr. STARLING. Mr. Long.

Mr. LONG. With respect to the NAM, we have circulated drafts of the bill to our committees, our board, and other members, and to the best of my knowledge, there is no dissent.

Mr. STARLING. Thank you. We thank all the witnesses for being with us today.

[Whereupon, at 11:54 a.m., the committee was adjourned, subject to the call of the Chair.]

APPENDIX

American Paper Institute, Inc.
260 Madison Avenue, New York, N.Y. 10016 (212) 340-0670
cable address: AMPAPINST New York

Office of the President

August 2, 1985

The Honorable Strom Thurmond, Chairman
The Committee on the Judiciary
United States Senate
Dirksen Senate Office Building, SD-224
Washington, D.C. 20510

Re: Hearings on S.1300, 99th Congress
July 29, 1985

Dear Senator Thurmond:

I would like to take this opportunity to express, for the record, the strong endorsement by the American Paper Institute, Inc. (API) of S.1300, which provides that antitrust law violators be subject to individual responsibility for treble damages attributable to their actions.

The API is the national trade association of the primary pulp and paper manufacturing industry. Its 175 members account for over 90% of the pulp and paper manufactured in the United States.

At its last meeting, the API's Board of Directors voted, unanimously, to support the enactment of S.1300.

In prior years, when a variety of claim reduction and contribution proposals were pending with both retroactive and prospective application, there was some disagreement among API members as to which proposals to support. With the introduction of S.1300 and its approach to antitrust remedy reform of individual treble damages responsibility, any disagreement that previously existed among members of API has been resolved. API members wholeheartedly support the concept of much-needed antitrust remedy reform encompassed by S.1300.

In an effort to keep this statement brief, API endorses the testimony given at the hearing on S.1300 before the Judiciary Committee on July 29, 1985 in behalf of the Chamber of Commerce of the United States, the National Association of Manufacturers, the Business Roundtable and by Ira Millstein and Griffin Bell.

If the API can furnish any further information to the Committee or be of any assistance in supporting the enactment of S.1300 please do not hesitate to call upon it.

Sincerely yours,

Louis Laun

Louis F. Laun
President

CITICORP CENTER
153 EAST 53 STREET
NEW YORK 10022
(212) 483-1000
TELEX: 126098

FOUR EMBARCADERO CENTER
SAN FRANCISCO 94111
(415) 981-5800
CABLE: "NUMLATUS, S.F."
TELEX: ITT 470989

21 AVENUE GEORGE V
75008 PARIS
723-95-48
"NUMLATUS PARIS"
TELEX: 842-650288

SHEARMAN & STERLING
53 WALL STREET
NEW YORK 10005
(212) 483-1000
CABLE: "NUMLATUS" TELEX: ITT 421295 WU 128103

ST. HELEN'S, 1 UNDERSHAFT
LONDON EC3A 8NR
01-283-8900
"NUMLATUS LONDON EC3"
TELEX: 881-884276

39TH FLOOR, CITICORP CENTRE
18 WHITFIELD ROAD
CAUSEWAY BAY
HONG KONG
5-837122
CABLE: "NUMLA HK"
TELEX: 780 633-14

POST OFFICE BOX 2949
ABU DHABI
UNITED ARAB EMIRATES
324477
CABLE: "NUMLATU"
TELEX: 948 22802EM

September 17, 1985

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Room SR-218
Russell Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

The undersigned wish to express their support for S. 1300, a bill now before your Committee. We are requesting, therefore, that the attached Report be entered into the record. In addition, if there are any more hearings on the bill, one or more of us would be happy to appear to testify in favor.

These views are submitted by the undersigned in their individual capacities, and not as representatives of the American Bar Association or any of its sections. The report has not been approved by the Board of Governors or the House of Delegates of the ABA and thus does not represent the views of the American Bar Association.

Please let me know if any of us can be of further assistance in support of S. 1300.

Respectfully submitted,

James T. Halverson
Chairman, Section of Antitrust Law
American Bar Association

on behalf of himself and:

REPORT

ON LEGISLATION SEEKING TO APPORTION DAMAGES AMONG DEFENDANTS IN TREBLE DAMAGE LITIGATION

This report is submitted by the undersigned individuals in their private capacities and not as representatives of the American Bar Association or any of its sections.

Senate Bill S.1300 seeks to apportion liability among defendants in certain types of antitrust litigation by replacing the rule imposing joint and several liability with one which would make each defendant liable only for injuries attributable to that defendant. This Bill deserves support, because the existing procedure has proven to be extremely unfair to litigants. Numerous defendants in recent years have complained of being forced, by the sheer magnitude of the damage claim they confront, to settle antitrust litigation that was without merit and that should have been tried.

By apportioning liability among defendants, S.1300 will reduce the size of the damage claim facing any particular defendant, while leaving intact the overall damage claim against all defendants so that plaintiffs will still recover the full measure, trebled, of any damages they have suffered. Moreover, S.1300 assures that a plaintiff will be fully compensated, even though one or more defendants may be insolvent or beyond the jurisdiction of a United States court. S.1300 would apply only to actions commenced after the date of its enactment.

I. JOINT AND SEVERAL LIABILITY, WHEN COUPLED WITH OTHER PROCEDURES USED TO ASSESS DAMAGES IN TREBLE DAMAGE LITIGATION, PRODUCES UNFAIR RESULTS.

Currently, each defendant in a treble damage action based upon a violation of Section 1 of the Sherman Act is held jointly and severally liable for all damages incurred by a plaintiff or a class of plaintiffs, not only for the injury caused by that defendant, but for the injury caused by every other defendant as well. Thus, in an action in which a class of purchasers sues several defendants seeking to recover overcharges to the class resulting from price fixing, any defendant can be held fully liable for the entire amount of the injury to the class, trebled, even though that particular defendant may have made only a small portion of the total purchases from or sales to the plaintiff class.

This rule, when coupled with the willingness of courts to certify large nationwide class actions, means that a company can be confronted with liability running into billions of dollars and often exceeding its net worth.[1]

---

1 Examples are plentiful. In the Corrugated Container litigation (S.D. Tex.) (MDL-310), the court and the parties estimated that liability could be as high as $3 billion. In the Plywood litigation (E.D. La.)(MDL-159), three nonsettling defendants faced liability of $1.5 billion based on a formula approved by the jury. In the Boqosian litigation (E.D. Pa., Dkt. Nos. 71-1137 and 71-2543), the parties, prior to settlement discussions, estimated potential liability at between $3 and $12 billion.

Furthermore, a plaintiff is permitted to execute against a single defendant for the full amount of a judgment, and that defendant has no right to compel the other defendants, even defendants which may have been more culpable, to contribute to the payment.[2]

These two rules together--joint and several liability leading to very large exposure, and the absence of a right of contribution--permit plaintiffs to threaten any given defendant with the full burden of a nationwide,

---

2 In Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981), the Supreme Court refused to permit an antitrust defendant a right of contribution against other defendants, holding that apportionment of liability should be for Congress, not the Courts, to create. Numerous bills have been before Congress in recent years which would have created rights of contribution in antitrust cases. See, e.g., Report of the Committee on the Judiciary on S.1468, S. Rep. No. 96-428, 96th Congress, 1st Session (1979) (hereinafter "S.1468 Report"); Report of the Committee on the Judiciary, United States Senate on S.995, S. Rep. No. 97-359, 97th Congress, 2d Session (1982) (hereinafter "S.995 Report"); House Monopolies Subcommittee's Staff Report on Contribution Bill in 97th Congress, published Feb. 10, 1983 at 44 ATRR 280 (hereinafter "House Report").

industrywide claim for an overcharge, greatly tilting the relative bargaining power in favor of the plaintiff and allowing the coerced extraction of large settlements from defendants who would otherwise attempt to exonerate themselves at trial. Even where plaintiffs do not overtly take advantage of the disparate bargaining power they enjoy, the coercive impact of existing procedures becomes an inherent factor if other defendants decide to settle. When one alleged co-conspirator settles a case, the court does not reduce any final judgment against the non-settling defendants by the settling defendants' percentage share of the damages. Instead, the court merely subtracts the straight dollar amount of the settlement from the final, trebled, award.[3] At the very least, this means that whatever portion of the claim against the settling defendants was compromised by the settlement can then be reasserted against those which have not settled. Moreover, since many settlements in practice take place at a tiny fraction of the overall claim, the subtraction becomes of little or no consequence. The reality is that when one defendant begins to suspect that some or all of the other defendants may settle, there exists enormous pressure to settle first, or at least concurrently.

---

3 See Hydrolevel Corp. v. Am. Soc'y of Mech. Engineers, 635 F.2d 118, 130 (2d Cir. 1980), aff'd, 102 S. Ct. 1935 (1982); Flintkote Co. v. Lysfjord, 246 F.2d 368, 398 (9th Cir. 1957), cert. denied, 355 U.S. 835 (1957).

Nor is the problem created by joint and several liability and the absence of contribution confined to the dynamics of litigation. Subjecting a single defendant to full liability for the injury caused by an entire industry can also adversely affect its creditworthiness and ability to attract capital. It is common for accountants and securities lawyers to insist that potential liability be disclosed in financial statements and in prospectuses. As a result, antitrust defendants complain that the mere pendency of a treble damage case can impair their credit line or their access to capital.[4] This problem is more likely to affect a small company than a large one. To a defendant with a 50% market share, for example, the effect of joint and several liability is merely to double its liability over what it would be if damages were apportioned, whereas the liability of a company with a 2% market share is multiplied 50 times. Thus it is small companies, whose financial condition can least tolerate disruption, that tend to suffer most from the current rule.

---

4 During hearings on S.1468, the Senate Judiciary Committee heard much testimony on this aspect of treble damage litigation. For example, George Kress of Green Bay Packaging Company described how his small family-run business, merely because it was named as a defendant in the Corrugated Container litigation, was unable to roll over debt arrangements that had been in place for many years (see S.1468 Report, p. 15).

II. THE SECTION OF ANTITRUST LAW OF THE AMERICAN BAR ASSOCIATION HAS ENDORSED THE APPORTIONMENT OF DAMAGES.

The Section of Antitrust Law of the American Bar Association has previously called these problems to the attention of Congress. On September 6, 1979, the Section approved and received blanket authority to publish, "Report of the Section on Proposed Amendment of the Clayton Act to Permit Contribution in Damage Actions," 49 Antitrust L.J. 291. The Section concluded that the proponents for a change in the law have adequately established, first, that current procedures for assessing damages can operate very unfairly on defendants, and second, that the problem can be addressed in major part through the apportionment of damages.[5] The Section of Antitrust Law's 1979 Report urged the creation of a

---

5 Subsequent to the Section of Antitrust Law's 1979 Report, both houses of Congress received thousands of pages of additional testimony and documentation confirming and further documenting the need for change. The Senate Report on S. 995 concluded:

> "Laws which are legitimately designed to deter and punish wrongdoers should not be used to permit plaintiffs to settle with a few defendants and then extract * * * proportionately larger payment from other defendants, who would be faced with liabilities well beyond their own market shares" (p. 2).

(Footnote Continued)

right of contribution, because that was the question then before Congress (in the form of Senate Bill, S.1468). For reasons developed more fully below, we think the elimination of joint and several liability is actually a simpler and preferable vehicle for apportioning liability. A principal argument used to oppose contribution was a concern that the introduction of cross claims among defendants would complicate antitrust litigation to a greater extent than already exists (see, e.g., House Report at 289). The key advantage of S.1300 over the earlier contribution proposals is that the elimination of joint and several liability does not cast the defendants into adverse roles vis-a-vis one another, and thus should not add any complexity to antitrust litigation.

In our view, the apportionment of liability along the lines provided for in S.1300 will bring about a more desirable balance than now exists between the parties in conspiracy litigation brought to recover overcharges or

---

(Footnote Continued)

The House Report similarly concluded:

> "Existing law * * * does carry some potential for unfairness because of joint and several liability, particularly in the context of large class actions. A relatively small, less culpable defendant could be forced to pay treble damages arising from industry-wide violations that are grossly disproportionate to its conduct" (44 ATRR 280, 297).

undercharges.[6] By making each defendant liable only for injuries attributable to that defendant, the size of a company's potential liability will in most cases bear some logical or natural relationship with the size of the company, and potential liability for injury caused by others will no longer operate to coerce settlements or impair credit.

We do not think that the abolition of joint and several liability within the scheme of S.1300 will work undue hardship on plaintiffs, since the aggregate damage award, as such, will not be affected. The principal justification for requiring each defendant to be jointly and severally liable

---

6 S.1300 appears to apply only to horizontal restraints of trade in which the plaintiff or plaintiff class seeks to recover an overcharge resulting from a conspiracy among sellers or an undercharge resulting from a conspiracy among buyers. There are many situations in which the apportionment of liability would be equally desirable, but which appear to fall outside the scope of S.1300. See, e.g., Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979) (addressing whether a right of contribution should exist in an action alleging a vertical conspiracy between a manufacturer and its distributor); Hydrolevel Corp. v. Am. Soc'y of Mech. Engineers, 635 F.2d 118 (2d Cir. 1980), aff'd, 102 S. Ct. 1935 (1982) (holding that an innocent ASME could be held liable for the tortious conduct of two of the plaintiff's competitors acting under the auspices of ASME, even though plaintiff had settled with the two guilty parties). By endorsing S.1300, we do not suggest that the apportionment of liability in some of these other types of antitrust cases should be ignored. We urge the Congress to reconsider the question of contribution, irrespective of what action is taken on S.1300.

for injuries caused by other defendants is to insure that the plaintiff or plaintiff class is fully compensated for his loss.[7] As a practical matter, this concern is of little consequence in most horizontal price fixing litigation, because defendants tend to be companies of substantial size from which judgments can readily be collected. And for the rare case in which an antitrust defendant could not satisfy a judgment, S.1300 accommodates the plaintiff by continuing to impose joint and several liability on the other defendants with respect to the portion attributable to the insolvent defendant.[8]

III. THE ARGUMENTS AGAINST APPORTIONMENT OF LIABILITY ARE NOT SUBSTANTIAL.

Opponents of S.1300 argue that the elimination of joint and several liability may undermine the deterrent

---

7 See, e.g., Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 646 (1981) ("joint and several liability simply ensures that the plaintiffs will be able to recover the full amount of damages from some, if not all, participants"). A good general discussion of the concept of apportioning liability is set forth by Littman and Van Buskirk, "The 'Dogmas' of Antitrust Actions: A New Perspective," 25 Antitrust Bull. 687 (1979).

8 Subsection (b)(2) provices that the limitation of liability "shall not apply to that portion of damages * * * which a claimant is unable to recover due to the financial incapacity of any person to satisfy a judgment."

effect often attributed to private treble damage litigation in preventing violations of the antitrust laws. We think this concern is without merit. There is simply no support for the notion that "deterrence" is enhanced by giving to a plaintiff the option of imposing upon one defendant all of the liability attributable to many. To the contrary, one can argue that deterrence will be enhanced by a rule which is more likely to impose some liability on each defendant over a rule which whimsically could place all of the liability upon one defendant and thereby create a windfall to the others.[9] Justice Brennan, for example, while a member of the New Jersey Supreme Court, made the following observation:

> "If each intentional wrongdoer knew that his conduct was exposing him to the risk of certainty of liability in some amount, the desired deterrent effect would be produced more surely than if [apportionment of liability] among wrongdoers is denied" (Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 88, 110 A.2d 24, 34 (1954)).

Of course, the other side of the argument is that the possibility of a larger judgment, even though less certain, acts as a greater deterrent.[10] The reality is

---

9 See, e.g., Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1185 (8th Cir. 1979) ("To deny [apportionment of liability] would be to dilute the deterrent effect of the antitrust laws, since the participant in an antitrust violation could escape all liability for its wrongdoing").

10 See, e.g., Georges Radio Inc. v. Capital Transit Co., 126 F.2d 219, 220-21 (D.C. Cir 1942):

> "[t]he knowledge of a person that he is responsible for all the consequences of a wrong will serve to restrain him, and will thus induce persons to guide themselves a little more warily against participation with others in acts which might produce tort liability."

11

that neither argument is empirically supportable, and thus neither can properly form the basis for injecting the concept of "deterrence" into the policy considerations involved in the apportionment of damages.'' The House Report recognized that deterrence is not one of the objectives of a rule of joint and several liability, largely because of the point made earlier that the rule's impact is so much greater upon smaller companies than upon larger ones (see House Report at 288).

Another argument offered in opposition to S.1300 is that a plaintiff will be forced to sue all defendants for whose actions it wishes to recover. Although technically true, this is not a persuasive reason for opposing the bill. As already noted, S.1300 will apply primarily to horizontal price fixing cases in which the plaintiff seeks to recover an overcharge, and in the great bulk of those cases the plaintiff already names as defendants most or all of those alleged to have conspired. It is thus unlikely, as a practical matter, that S.1300 will have much effect at all on the cases to which it is directed.

---

11 As noted by the Supreme Court in Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 636 n.8, (1981):

> "Economists disagree over whether business decisionmakers, be they the high-level or the middle-level management, are 'risk averse'; i.e., they would prefer a greater certainty of a small loss to a less certain chance of a greater loss."

The bill will, to be sure, override those cases holding that a plaintiff need not sue the entity with which it dealt in order to recover for price fixing.[12] Under S.1300, a plaintiff will be required to sue the company with which it actually dealt and to which it paid an overcharge. This, however, should not work any undue hardship on plaintiffs, because the limitation of liability will not operate with respect to any defendant beyond the jurisdiction of a United States court.[13] Certainly, any difficulty that S.1300 would impose upon a plaintiff in this respect seems more than offset by the need to change the current law.

---

12 In City of Atlanta v. Chattanooga Foundry & Pipeworks, 127 F. 23, 26 (1906), aff'd, 203 U.S. 390 (1906), for example, the court held that plaintiff in a bid rigging case was not required to sue his supplier and could instead maintain an action solely against the individuals who agreed not to bid:

> "If the agreement between the defendants and their associates was unlawful and tortious, each is responsible for the torts committed in the course of the illegal combination. These defendants have themselves participated in the benefits resulting from the bonus paid by the Alabama member of the association, and have no ground to complain that they have been alone sued."

13 Subsection (b)(1) provides that the limitation of liability "shall not apply to that portion of damages--attributable to any person that is beyond the jurisdiction of the United States district courts."

The U.S. Department of Justice, Antitrust Division, has opposed S.1300, in part because the bill would apply principally to horizontal combinations such as for price fixing (see testimony of Charles F. Rule, Acting Assistant Attorney General, before the Committee on the Judiciary, United States Senate, on July 29, 1985, p. 8). By supporting S.1300, we do not suggest that individuals and companies found guilty of price fixing and other horizontal violations of the antitrust laws should be accorded leniency as compared with current practice. We note, however, that the criminal and civil remedies available to the Department of Justice for Sherman Act violations, and the treble damage remedy available to private entities injured by such wrongdoing, already constitute substantial sanctions. We question whether joint and several liability adds any further incentive toward compliance, and we are still concerned with the extent to which companies may be forced into a litigation posture that precludes the assertion of innocence.

Respectfully submitted by:

James T. Halverson
Shearman & Sterling
New York, NY
Chairman, 1985-86
Section of Antitrust Law
American Bar Association (ABA)

Miles W. Kirkpatrick
Morgan, Lewis & Bockius
Washington, D.C.
Chairman, 1968-69
Section of Antitrust Law, ABA

Frederick M. Rowe
Kirkland & Ellis
Washington, D.C.
Chairman, 1969-70
Section of Antitrust Law, ABA

Richard K. Decker
Lord, Bissell & Brook
Chicago, IL
Chairman, 1971-72
Section of Antitrust Law, ABA

Julian O. von Kalinowski
Gibson, Dunn & Crutcher
Los Angeles, CA
Chairman, 1972-73
Section of Antitrust Law, ABA

Thomas M. Scanlon
Barnes & Thornburg
Indianapolis, IN
Chairman, 1973-74
Section of Antitrust Law, ABA

John Izard
King & Spalding
Atlanta, GA
Chairman, 1974-75
Section of Antitrust Law, ABA

Edwin S. Rockefeller
Schiff, Hardin & Waite
Washington, D.C.
Chairman, 1976-77
Section of Antitrust Law, ABA

Allen C. Holmes
Jones, Day, Reavis & Pogue
Cleveland, OH
Chairman, 1978-79
Section of Antitrust Law, ABA

Earl E. Pollock
Sonnenschein, Carlin, Nath & Rosenthal
Chicago, IL
Chairman, 1979-80
Section of Antitrust Law, ABA

Harvey M. Applebaum
Covington & Burling
Washington, D.C.
Chairman, 1980-81
Section of Antitrust Law, ABA

E. William Barnett
Baker & Botts
Houston, TX
Chairman, 1981-82
Section of Antitrust Law, ABA

Carla A. Hills
Latham, Watkins & Hills
Washington, D.C.
Chairman, 1982-83
Section of Antitrust Law, ABA

Richard W. Pogue
Jones, Day, Reavis & Pogue
Cleveland, OH
Chairman, 1983-84
Section of Antitrust Law, ABA

Richard A. Whiting
Steptoe & Johnson
Washington, D.C.
Chairman, 1984-85
Section of Antitrust Law, ABA

○